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In The

Supreme Court of the United States

October Term, 1995

CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., BROWNS LAKE RANCH, MAC ENTERPRISES, INC., VAN KAY, INC., and DERK VAN KONYNENBURG,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 *et seq.*) authorized the Secretary of Agriculture to regulate handlers to benefit producers by raising prices to parity and to avoid unreasonable fluctuations in supplies and prices. (7 U.S.C. §§ 602(2) and (4). The Secretary issued the Marketing Order for almonds (7 C.F.R. § 981.1 *et seq.*) in 1950 which provided, *inter alia*, for the Secretary to have the authority to order a percentage of the crop called a "reserve" to be kept off the market during large crop years and subsequently sold in subsequent small crop years (as almonds were considered an "alternate bearing" crop) or order the nutritious "reserve" almonds disposed into "non-competitive" economically worthless markets like cattle feed, almond oil or USDA's school lunch programs. The Secretary imposed reserves ranging from 2% to 10% from and including 1982 through 1985 and 1990 which almonds he ordered disposed of, costing Petitioners over four million dollars. With respect to these reserves, the Secretary gave the Petitioner handlers the "choice" of either disposing of the almonds in these economically worthless outlets acting as the Secretary's agent, or delivering physical possession of the "reserve" almonds to the Secretary. In 1988 the Secretary ordered a 25% reserve and ordered it held by, and at considerable expense to, the handlers (for the account of the Secretary), and later released it at the beginning of the next crop year. The Secretary described the legal effect of these "reserve" announcements as giving him "plenary control" and "complete power" over the reserve almonds. The Secretary's actions present the following questions:

1. Whether the Secretary took Petitioners' almonds without payment of just compensation in violation of the Fifth Amendment, to wit:

a. Whether the Secretary committed a *per se* TAKING by giving Petitioners the illusory "choice" between surrendering physical possession or disposing of the "reserve" almonds as the Secretary's agent?

b. If not a *per se* TAKING, then whether the Secretary committed a regulatory TAKING when he destroyed all economic viability of the "reserve" almonds without demonstrating that the destruction of "reserve" almonds substantially advanced the government's asserted objectives of either raising prices or avoiding unreasonable fluctuations in supplies and prices?

c. Whether Congress and the Secretary can defeat a TAKING claim by the mere possibility that annually the Secretary might determine that a percentage of the crop will later be banned from the market and destroyed after the crop has been planted, grown, harvested and processed?

d. Whether Congress and the Secretary can defeat a TAKING claim by contending that the Petitioners entered into the almond industry business after Congress decided that the Secretary can, on an annual basis, decide whether to "regulate" almond sales?

PARTIES TO THE PROCEEDINGS

The Petitioners are Cal-Almond, Inc., Gold Hills Nut Company, Saulsbury Orchards and Almond Processing (or Ellen Briones, Chapter 7 Trustee in Bankruptcy for Saulsbury Orchards and Almond Processing, Inc.), Browns Lake Ranch, Mac Enterprises, Inc., Van Kay, Inc. and Derk Van Konynenburg. None of the Petitioners have any parent companies nor any subsidiaries nor do any of them issue shares of stock to the public. (Rules of the Supreme Court, Rule 29(6)). The Respondent is the United States of America.

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The Petitioners identified herein respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (App. A)[1] is unpublished and was decided on December 20, 1995. Petitioners' Petition For Rehearing And Suggestion For Rehearing En Banc (App. B) before the Federal Circuit was denied on April 1, 1996. The United States Court of Federal Claims decision (App. C) was entered on January 5, 1994, and on January 10, 1994 (App. __ judgment was entered by it dismissing Petitioners' complaint (App. __).

The decision of the Ninth Circuit Court of Appeals (App. __) is reported at 14 F.3d 429 (9th Cir. 1993) which found that the reserve requirements of the Almond Marketing Order for each year at issue here were lawfully promulgated pursuant to the Administrative Procedures Act (App. at pp. __-__).

The opinions of the Judicial Officer for the United States Department of Agriculture (USDA)[2] upholding the reserve requirement (App. __)[3] is reported at 50 Agric. Dec. 23, and for

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1. References to "App." are to the appendix to the petition in this case.

2. The Judicial Officer's opinion is lengthy and encompasses many issues not relevant here. Therefore, only the portion of the opinion addressing the almond reserves are included in the appendix.

3. Pursuant to Title 7 U.S.C. § 608c(15)(A), Petitioners were required to exhaust administrative remedies before USDA. Once Petitioners exhausted administrative remedies, Title 7 U.S.C. § 608c(15)(B) required Petitioners to seek review in the United States District Court. The District Court's decision regarding the legality of the imposition of the reserve parrots the Judicial (Cont'd)

later crop years, the Judicial Officers opinions were issued on March 8, 1991, (App. H) and December 11, 1991, respectively (App. G). Petitioners herein seek review from the Federal Circuit's decision issued on December 20, 1995 (App. C) following the Federal Circuit's denial of Petitioner's Petition For Rehearing And Suggestion For Rehearing En Banc (App. A) issued on April 1, 1996.

STATEMENT OF JURISDICTION

1. The judgment of the Federal Circuit Court of Appeals was entered on December 20, 1995. Petitioners' Petition For Rehearing was denied on April 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> . . . nor shall private property be taken for public use, without just compensation.

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (Act) are:

7 U.S.C. §§ 601, 602, 608a(5), 608c(6), (7),

(Cont'd)
Officer's decision, which was then affirmed by the Ninth Circuit (App. F). Therefore the District Court's rulings in this regard are not included in this appendix, especially in light of the fact that Petitioners herein seek review of the Federal Circuit's decision finding that there was no "TAKING" under the Fifth Amendment of the United States Constitution. The issue of TAKINGS was not an issue before the Ninth Circuit, nor could it have been because "money damages" are not available in administrative exhaustion proceedings.

(14)(A), (14)(B), (15)(A) and (15)(B).

They are reproduced at App. N.

The relevant regulations implementing the Act are

7 C.F.R. §§ 981.45, .46, .47, .48, .49, .50, .51, .52, .54, .55, .56, .57, .59, .65, .66, .67, .70, .81, .466, and .467.

They are reproduced at App. N.

STATEMENT OF THE CASE

A. Relevant Facts

1. This is a case of first impression under the Fifth Amendment TAKINGS clause. It is a challenge to the almond reserve provisions of the Marketing Order instituted (in 1950) for California almonds (7 C.F.R. § 981.1 *et seq.*) and issued by the Secretary of Agriculture pursuant to the authority of the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. § 601 *et seq.* It involves specific annual determinations by the Secretary with respect to five crop years in the 1980's and 1990 wherein he imposed a reserve.

The Secretary took Petitioners' almonds for the alleged "public use" of increasing and stabilizing prices and supplies. The Secretary carried out this TAKING by imposing "reserves" (a percentage of the crop delivered to the Petitioner handlers that could not be sold).

The Secretary made Petitioners' nutritious and economically valuable almonds (worth in excess of four million dollars) his own by regulation; *i.e.*, he took them without compensation as prohibited by the Fifth Amendment. The

reserve regulations were imposed after the almonds were grown, harvested, delivered to handlers, processed, and inspected. The TAKING was completed when the Secretary later ordered the reserve disposed of into economically worthless outlets like cattle feed. This "TAKING" was no different than — and as complete as — if the Secretary had hauled them off in a dumpster. For example, 7 C.F.R. § 981.52 orders Petitioners to hold "for the account of the Board" what had been Petitioners' almonds moments before. The Almond Board is the Secretary's appointed agency (7 C.F.R. § 981.30; 7 U.S.C. § 608c(7)(C)). The Secretary's Judicial Officer described the reserve as giving the Almond Board and Secretary "plenary" authority, "complete" power, and "full power and authority" over the reserve almonds and their disposition, and that handlers have "no voice" in the terms and conditions of the reserve (J.O. decision, App. at 102a-106a).

The handler Petitioners were left with none of the strands in their bundle of property rights, only the *duty* to care for the Secretary's almonds until disposal.

The Secretary also unconstitutionally took almonds belonging to Petitioners who are the producers (Browns Lake Ranch, Mac Enterprises, Van Kay, Inc. and Derk Van Konynenburg) who are not paid for their almonds because the Secretary imposed a reserve on handlers to whom they delivered their almonds. By the time the "reserve" was imposed in the crop years in question (described below) the producers had already sunk their cultural costs (in excess of $2,000 per acre per year) and handlers had already sunk substantial costs in processing said almonds. The Secretary also required the handlers to pay assessments on "reserve" almonds (7 C.F.R. § 981.81) even though the almonds were rendered valueless by the Secretary's action. The Secretary was not required to impose a reserve. Petitioners had no way of knowing or even guessing in advance of growing, harvesting and processing whether the Secretary would impose a reserve, much less the amount of the reserve. The

Secretary was not free to impose a reserve of his choosing, but only when, and to the extent necessary that, it would increase the producer prices and avoid unreasonable fluctuations in supplies and prices (7 U.S.C. §§ 602(2) & (4); 7 C.F.R. §§ 981.47 & 981.49). These are factual inquires which should have been resolved by a jury rather than on the government's motion to dismiss for failure to state a claim. The TAKING here was a *per se* TAKING as described in this Court's controlling precedent.

The Secretary was authorized pursuant to 7 U.S.C. § 608(c)(6)(B) of the AMAA to limit the amount of an agricultural product that could be sold and to provide for the control and disposition of any surplus (7 U.S.C. § 608c(6)(D) of said product, in order to avoid "unreasonable fluctuations in supplies and prices (7 U.S.C § 602(4)). After the Almond Marketing Order was issued, the Secretary, on an annual basis (and based upon the recommendation of the Almond Board (7 C.F.R. § 981.49)), can, but is not required to, issue a "reserve" which is an order that almond handlers must hold from sale a certain percentage of their almonds (§§ 981.50-.52).[4] Under the Almond Marketing Order the Secretary has the authority to later increase the saleable percentage of almonds for the crop year in question (§ 981.48) or order the handler to dispose of said almonds into non-competitive (and economically worthless) outlets approved to by the Secretary (§§ 981.66 and 981.67) but only if the handler agrees to act as an "agent" for the Almond

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4. It is important to note that each pound of almonds is a separate unit of property. *See Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S. Ct. 2886, 2894, n.7 (1992). Handlers pay growers a certain amount of money per pound; almonds are sold by handlers by the pound (or sometimes by the kilo); and the Secretary assesses handlers by the pound (7 C.F.R. § 981.81) for the Board's operations (including advertising and promotion, which has sparked other requests for Supreme Court review; Solicitor's Cert. Petition No. 95-1879, Cal-Almond Cert Petition No. 95-1978).; and Solicitor's Cert. Petition granted, No. 95-1184 (treefruit advertising and promotion assessments.)

Board (§§ 981.52 and 981.67). If the handler does not "agree" to become an agent of the Almond Board, the handler is required to deliver physical custody of the reserve percentage to the Almond Board which would then dispose of these almonds (§§ 981.52 and 981.67). The Secretary appointed the Almond Board, all of whose numbers compete with Petitioners, as his agent to administer the program (7 C.F.R. §§ 981.30-.34) The outlets available for disposition of the reserve (7 C.F.R. § 981.66(c)) are economically worthless outlets like almond oil, almond butter, animal feed and charities (garnering $.03 to $.10 per pound compared to competitive markets garnering $1.10 to $2.00 per pound — depending upon the crop year in question.) In some years USDA allowed a reserve outlet to be USDA's own school lunch program (7 C.F.R. § 981.467(c)), where USDA purchased them for less than half their value. The Secretary deprived Petitioners of all economically valuable use of these almonds by first banning their sale to normal competitive outlets and then ordering their disposal in worthless outlets. The small amount of money received from their "salvage" outlets does not even cover the costs of processing, storing and fumigating the almonds. Whether measured from the handler or grower level, the Secretary's action caused a net loss worse than the "ordinary" TAKING.

The saleable almonds are each handlers' quota fixed by the Secretary within the meaning of 7 U.S.C. § 608a(5) (7 C.F.R. § 981.50) and substantial civil and criminal penalties can be imposed on any handler who does not comply with the reserve/quota program (7 U.S.C. § 608a(5); 7 U.S.C. § 608c(14)(A)). Petitioners Cal-Almond, Inc., Gold Hills Nut Company and Saulsbury Orchards and Almond Processing were almond handlers during the relevant time in question herein. Petitioners Browns Lake Ranch, Mac Enterprises, Inc., Van Kay, Inc. and Derk Van Konynenburg were almond growers during this period of time and marketed their product through Petitioner Cal-Almond, Inc.

The goal of the AMAA is to "establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce", and to maintain or raise to parity prices to producers of the agricultural product (7 U.S.C. §§ 602(1), (2) & (4))

2. The Secretary imposed a 2% reserve on the 1982 crop requiring all handlers to dispose of 2% of the almonds into these non-competitive economically worthless outlets or give the almonds to the Almond Board who would then dispose of them. The 2% reserve in 1982 amounted to 67,099 pounds with respect to Petitioner Cal-Almond, and 198,621 pounds with respect to Saulsbury Orchards and Almond Processing (hereinafter SOAP). For the 1983-1984 crop year the Secretary imposed a 3% reserve which was 98,231 pounds to Cal-Almond, and 67,858 pounds to SOAP. For the 1984-1985 crop year the Secretary imposed a 25% reserve, 20% was later released into fully saleable channels, and therefore 5% of the total product was ordered dumped into the economically worthless outlets. The 5% reserve imposed on SOAP was 857,404 pounds, and on Cal-Almond it was 334,462 pounds. For the 1985-1986 crop year the Secretary imposed a 20% reserve, later released half of it, and ordered 10% of it dumped into the economically worthless outlets. The 10% reserve amounted to 619,754 pounds to Cal-Almond, Inc., and 905,354 pounds to SOAP (App. at pp.119a-122a, 136a-139a).

For the 1988-1989 crop year the Secretary imposed a 25% reserve, and ordered it held, at handler expense, pending his final determination as to whether or not the reserve would be released into fully saleable channels. On August 1, 1989 (a month and a half after the new crop year began) the Secretary ordered the release of the entire reserve. That reserve amount was 402,408 pounds to SOAP, 317,410 pounds to Gold Hills and 2,667,128 pounds to Cal-Almond. It cost the handler Petitioners in excess of $.17 per pound just for storing these almonds for the account of the Secretary (App. at pp. 123a, 139a-140a).

For the 1990-1991 crop year the Secretary imposed a 35% reserve, later released all of it but 7%, and ordered the 7% dumped into the economically worthless outlets. That 7% reserve was 38,000 pounds to SOAP, 210,000 pounds to Gold Hills, and 1,626,151 pounds to Cal-Almond (App. at pp. 124a-125a, 141a).

When the product must be dumped, the grower cannot receive any payment for it because the price received by the handler is far less than the handler's processing and receiving costs (App. at pp. 126a, 142a, 144a). The 7% reserve for the 1990-91 crop year attributable to Petitioner growers Browns Lake Ranch was 34,169 pounds, 60,175 pounds to Mac Enterprises, 6,097 pounds to Van Kay, Inc., and 23,705 pounds to Derk Van Konynenburg (App. at pp. 125a-126a, 141a-142a).

The differences between the prices the Petitioner handlers received for their reserve almonds dumped into outlets like cattle feed was between $.03 and $.10 per pound (which did not even come close to recouping their costs), when the market price for fully saleable almonds ranged anywhere from $ 1.10 per pound to approximately $2.00 per pound, thus costing the Petitioners (combined) well over four million dollars (App. at pp. 18a, 113a, 126a, 136a-143a).[5] The "reserve" did not advance "orderly marketing" nor increase producer revenue. Indeed it substantially decreased producer revenue (App. at pp. 122a, 136a-138a).

B. Proceedings Below

1. The present case arose from several administrative petitions filed by the Petitioners in this case. Title 7 U.S.C. § 608c(15)(A) requires that handlers exhaust administrative

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5. The four million dollar figure does not include the loss to Cal-Almond for the 1988 and 1990 crop year; *see* footnote six and accompanying text. Cal-Almond's loss for 1988 and 1990 was approximately $2.5 million.

remedies before proceeding to court. No pre-deprivation remedy is available. *United States v. Ruzika*, 329 U.S. 287 (1946).

In 1987 Petitioners Cal-Almond and SOAP filed an administrative petition challenging, among other things, the reserve requirement for the 1982 through 1985 crop years contending they were not lawfully promulgated and violated the Administrative Procedures Act. On January 23, 1991 the Judicial Officer issued a ruling and held that the reserve programs from 1982 through 1985 were not arbitrary and capricious, and did comply with the APA (App. at pp. 85a-110a).

In the interim, Petitioners Cal-Almond, Saulsbury and Gold Hills Nut Company filed another administrative petition challenging the reserve requirements for the 1988-1989 crop year (a 25% reserve which was later released) and yet another one with respect to the 7% reserve ordered disposed of for the 1990-1991 crop year. On March 8, 1991 the Judicial Officer issued a ruling with respect to the 1988-1989 crop year finding that the reserve was lawfully imposed (App. at pp. 79a-84a). Finally, on December 11, 1991 the Judicial Officer issued his decision (App. G) finding that the reserve requirements for 1990-1991 were lawful (App. at pp. 66a-78a).

In the administrative proceedings before the Secretary of Agriculture challenging the reserve regulations, the Secretary, through his Judicial Officer, who is the final decision maker for USDA (7 C.F.R. §§ 900.50 *et seq.*), explained the Secretary's power over the reserve as follows: "Since the Order gives the Board the full power and authority to sell or dispose of all reserve almonds, subject only to the conditions of the order, and the Secretary's right to disapprove, it does not matter whether a handler is economically compelled to enter into an Agency agreement." (App. at 106a). "Whether or not there is an Agency agreement, the Board has complete power as to all reserve

almonds." (App. at 106a). "But the Board does not have to seek handler approval or concurrence with respect to anything relating to the disposition of reserve almonds. . . ." (App. at 106a). "The Board's plenary authority as to reserve almonds is not challenged." (App. at 106a). "Whether it was wise to give the Board complete authority to dispose of the reserve almonds as it sees fit, subject only to the conditions set forth in the order, and the Secretary's veto authority, is not open to question. . . ." (App. at 106a). "Wisely, or unwisely, under the order, handlers have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds and, therefore, it is enough that the Secretary approve the minimum prices and assessments determined by the Board for the program for almond butter and school lunches, without seeking the advice and consent of handlers, or promulgating the Board determination through APA rulemaking." (App. at 106a).

2. From each of the three Judicial Officer decisions discussed above, the respective Petitioners filed a petition for review in the District Court pursuant to 7 U.S.C. § 608c(15)(B). The District Court agreed with the Judicial Officer that the reserve obligations were properly promulgated, and, in cases ordered consolidated by the Ninth Circuit, the Ninth Circuit determined that the reserves were properly promulgated. The Ninth Circuit decision was issued on December 22, 1993 (App. at pp. 50a-64a).

However, since a compensation remedy for a TAKING was not available through the administrative petition process, Petitioners filed their original claim in the United States Court of Federal Claims (hereinafter Claims Court) in April, 1991 alleging TAKINGS had occurred as a result of the almond reserves. However, thereafter, the United States Court of Appeals for the Federal Circuit handed down its en banc decision in *UNR Industries v. United States*, 962 F.2d 1013 (Fed. Cir.

1992) which held that regardless ofthe type of relief sought in any other court, the Court of Claims has no jurisdiction if a case is pending in any other court arising out of the same operative facts. Because the handler Petitioners had filed for review in the District Court from the Judicial Officer's decisions, the Claims Court complaint was dismissed without prejudice. The Petitioners then withdrew their challenges in the District Court with respect to the 1982 through 1985 crop year reserves, and all the Petitioners except Cal-Almond withdrew their challenges to the 1988-1989 and the 1990-1991 reserve so that they could proceed in the Claims Court with respect to those crop years. Cal-Almond alone pursued in the Ninth Circuit Court of Appeals the legitimacy of the 1988-1989 reserve and the 1990 and 1991 reserve. Petitioners then filed a new complaint in the Claims Court, and then amended that complaint on August 19, 1992 (App. at 111a).[6]

The issue as to whether or not a TAKING had occurred was tried by the Claims Court on cross-motions for summary judgment and the government's motion to dismiss for failure to state a claim. Virtually all of the underlying facts were not disputed. The government did not dispute Petitioners' statement of uncontroverted facts (App. at 130a-146a).

3. On January 5, 1994 the Honorable Judge Wiese of the Claims Court held that the Secretary's actions were neither a TAKING *per se* of Petitioners' almonds nor a regulatory TAKING. The Claims Court ruled that since the almond industry

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6. Because of the late date of the Ninth Circuit ruling (December of 1993) and because the matter was already then and there under submission in the Claims Court, Cal-Almond did not amend the complaint to allege its own TAKINGS challenges for the 1988-89 or 199091 crop years, but intends to do so, in order to preserve its challenges to the 1988-89 and 1990-91 crop years. If the complaint was filed now it would result in the same decision rendered in the instant case below.

had been regulated for over 40 years and because Petitioners had entered into the business after the Marketing Order was already in existence, the Petitioners "must be understood to have had accepted, as a condition of their continuing presence in the industry, the very mode of regulation about which they now complain." (App. at 19a). The Claims Court further stated that since the government has "plenary authority over commerce" and, because of the "pervasive presence of the federal government in the regulation of American agriculture during the past half-century, Plaintiffs cannot reasonably assert a property interest in their almond crops free of government control." (App. at 19a-21a). The Claims Court also stated: "The government's power to regulate the flow of agricultural products affecting interstate commerce is a pre-existing limitation on Plaintiffs' property interest in their almonds. The legitimate exercise of that power cannot give rise to a TAKING claim." (App. at 20a-21a). The court concluded that "Plaintiffs have failed to state a claim on which relief can be granted," and directed the "entry of judgment dismissing the complaint." (App. at 21a).

4. Petitioners filed a timely appeal from the judgment entered on January 10, 1994 and the Federal Circuit affirmed in an unpublished opinion. The court, held that Petitioners' "property rights and reasonable expectations were limited by the regulatory scheme existing upon their entry into the almond industry," (App. at 9a), relying on its own savings and loan cases, but no Supreme Court cases.

5. With respect to Petitioners' per se TAKINGS claim under the principles of *Loretto v. Teleprompter Manhattan CA TV Corp.*, 458 U.S. 419 (1982) the Court relegated that "discussion" to a single footnote, merely stating "we discern no factual or legal basis for Appellants arguments that the almond reserve should be considered per se TAKINGS under the principles of [Loretto]." (App. at 9a).

6. Neither the Claims Court nor the Federal Circuit addressed whether the reserve regulations "substantially advanced" the governmental interest as would be required to defeat a regulatory TAKINGS claim.

7. Petitioners filed a Petition For Rehearing and a Suggestion for Rehearing *En Banc* with the Federal Circuit, which was denied on April 1, 1996 (App. at 1a), leading to this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The Federal Circuit has decided these important questions in a manner that conflict with relevant decisions of this Court.

1. The Federal Circuit erred in holding that the protection of Fifth Amendment just compensation clause is lost to those who enter into an industry that Congress has theretofore empowered the Secretary with the authority to decide, on an annual basis, whether to regulate and the extent of said regulation.

This Court has never held that the TAKINGS clause does not apply to those who enter into a regulated industry. Indeed, this Court has held that the government "by *ipse dixit*, may not transform personal property into public property without compensation. . . . This is the very kind of thing that the TAKINGS clause of the Fifth Amendment was meant to prevent." *Webbs Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

First, this Court has recently rejected the "business regulation" defense in *Dolan v. City of Tigard*, __ U.S. __, 114 S. Ct. 2309, 2320 (1994). ("But simply denominating a governmental measure as a 'business regulation' does not

immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights [citations]" *id* at 2320). After citing First and Fourth Amendment cases for the proposition that these amendments fully applied as protections to businesses this Court held: "We see no reason why the TAKINGS clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." [7] (*Dolan* at 2320).

In *Dolan*, the city had its master land use plan in place for years prior to Mrs. Dolan's application for a building permit to expand her hardware store. The reasoning of the Federal Circuit decision in this case would have left Mrs. Dolan without a remedy. This Court held the opposite.

Every case relied upon by the Federal Circuit (App. at 9a-10a) concerned takeovers of financially troubled savings and loans. *California Housing Sec., Inc. v. United States*, 959 F.2d 955, 958 (9th Cir. 1992); *Golden Pac. Banicorp v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir. 1994). In those cases, the federal government took over possession of those savings and loans because the government determined that there had either been a violation of the banking regulations or that the claimants had committed unsafe or unsound practices that had dissipated its assets or earnings and therefore threatened the depositors. The Federal Circuit in those cases noted that the bank claimants subjected themselves to the expansive statutory regulatory

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7. In *Bolger v. Youngs Drug Products, Corp.*, 463U.S. 60(1983), Youngs Drug Products successfully challenged, on First Amendment grounds, a one hundred year old ban on mailing of unsolicited advertisements for contraceptives. If "entering into a regulated field" deprives the business person of constitutional protection then (as the Federal Circuit states) virtually all "older" regulations would survive constitutional scrutiny. That is obviously not the law.

system when they applied for and received federal deposit insurance from, and executed contracts with, the federal government. In the present case, Petitioners did not receive any government insurance or any government benefit whatsoever. Moreover, the Petitioners in this case committed no violations of the law.

This Court has never held that Congress' decision to empower an agency with the decision to regulate eviscerates future Fifth Amendment rights. The Federal Circuit's decision in this case has decided an important federal question which should be determined by this Court. If the Federal Circuit's decision were to stand, the government would be free to extinguish Fifth Amendment rights by simply deciding to regulate. For example, Congress could pass a law that states that starting in 1998 an agency "can" order the automobile manufacturing companies in the United States to donate every tenth car to a government approved charity, or give up physical custody of every tenth car to the government. In 1998 when Ford, General Motors and Chrysler are still in business, they could not be heard to complain because they stayed in the business knowing that the regulation could require the forfeiture of every tenth automobile. There is no difference in that scenario than the current one.

Secondly, the Federal Circuit ignored the holding in *Loretto v. Teleprompter Manhattan CA TV Corporation, supra,* wherein this Court held that a physical occupation or appropriation of property is a TAKINGS *per se*. In *Loretto*, the petitioner became a landlord of an apartment building that had for a number of years been heavily regulated by the City of New York. The placement of the cable box on her building could not be shown to diminish the value of her building, but this Court had no trouble whatsoever finding that a TAKING *per se* had occurred with respect to an item the size of a bread box attached to her building. The Federal Circuit here relegated the TAKINGS *per se*

"analysis" to a one line conclusory sentence stating that it did not apply (App. at 9a).

2. The Federal Circuit ignored binding precedent of this Court by not applying a per se TAKINGS analysis.

In *Loretto,* the Court held that there is a TAKING *per se* if there has been a "physical occupation" or "appropriation" of the property and that the government must pay just compensation, regardless of whether the regulation has gone "too far" or whether it achieves an important public benefit or only has minimal economic impact on the owner. *Loretto,* 458 U.S. at 434. This Court in *Loretto* stated that the "character of the governmental action" not only is an important factor in resolving whether the action works a TAKING, but is also "determinative." *Loretto* at 426 (1982). *See also, Lucas v. South Carolina Coastal Council,* __ U.S. __, 112 S. Ct. 2886, 2893 (1992).[8]

In the present case, the Federal Circuit refused to even address, let alone come to grips with, the nature of the governmental action in this case. The nature of the governmental action in this case is most succinctly set forth by the Secretary of Agriculture[9] who, with respect to the reserve, stated that: the Almond Marketing Order "gives the Board *the full power and*

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8. This Court has also found a TAKING *per se* when the government physically "invades" airspace (*United States v. Causby,* 328 U. S. 256, 265 and n. 10 (1946) and when the government imposes a navigational servitude upon a private marina (*Kaiser Aetna v. United States,* 444 U. S. 164 (1979). *See Loretto,* at 433-434.

9. This Court gives great deference to the Agency's interpretation of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-45 (1984); *Smiley v. -U.S.- Citibank (South Dakota), N.A.,* __ U.S. __, No. 95-860 Dec. June 3, 1996.

authority to sell or dispose of all reserve almonds . . . " (App. at 106a); "the Board has *complete power* as to all reserve almonds" (App. at 102a); "the Board does not have to seek handler approval or concurrence with respect to anything relating to the disposition of reserve almonds" (App. at 106a); ". . .the hearing record supporting the *Board 's plenary authority* as to reserve almonds is not challenged" (App. at 106a); "whether it was wise to give the Board complete authority to dispose of the reserve almonds as it sees fit . . . is not open to question. . ." (App. at 106a); and "wisely or unwisely, under the order, *handlers have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds*. . . ." (App. at 106a) (Emphasis added.)

The Marketing Order itself states that when a reserve is imposed the handlers must hold the almonds "in proper storage *for the account of the Board*". (7 C.F.R. § 981.52). (Emphasis added.) Furthermore, if the handler signs an Agency agreement he is merely acting as an agent of the Board in the disposition of the reserve almonds (7 C.F.R. § 981.67 and *see* Agency Agreement, App. at 15a). If a handler refuses to be conscripted as an agent of the Almond Board the handler is required to deliver the physical custody of the reserve to the Almond Board which then dumps it into non-competitive outlets (7 C.F.R. § 981.51). If the handlers sign up as an agent of the Board, but does not dispose of the reserve almonds by September 1 of the following crop year, the handler must immediately deliver the almonds to the Almond Board who then dumps them[10] (7 C.F.R. § 981.67). And while the handler holds those almonds "for the account of the Board" he is *required* to make them accessible to the Board and the Secretary (7 C.F.R. § 981.70). Thus, based upon the

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10. *See* App. at pp. 148a; letter of February 2, 1993 from Almond Board to a handler stating that the deadline to dispose of the reserve for 1990-91 crop year was December 1, 1992, that he had not disposed of them, and that Board was coming to pick them up if handler did not deliver them to the Board.

Almond Marketing Order and the Secretary's determination as to the power given to him and the Almond Board, there are no strands left in Petitioners' bundle of property rights when the reserve is imposed. In short, if the handler does not agree to be recruited into the Secretary's army for purposes of disposition of reserve the Almond Board (USDA's appointed entity) will physically occupy those almonds, appropriate them from the handler, take physical possession of them, and dispose of them.

The Federal Circuit erred in determining that the Secretary's power to regulate can thus redefine property rights which theretofore had existed for centuries before the Almond Marketing Order had been enacted. (Almonds have been grown in California for well over 100 years prior to the issuance of the Almond Marketing Order). As this Court stated in Loretto: "Moreover, the government does not have unlimited power to redefine property rights. [citations]" *Loretto* at 439.

Thus, the Federal Circuit decision conflicts with relevant decisions of this Court with respect to the *per se* TAKINGS analysis in *Loretto*. The Federal Circuit's decision in this case conflicts with this Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) which held that one of the "most essential sticks in the bundle of rights that are commonly characterized as property" is the ability to exclude others. In this case, once the Secretary announces a reserve, the Petitioners do not have the ability to exclude the Secretary from taking their almonds.

The regulation is not saved by the handlers' ability to become an "agent" of the Secretary to avoid the Secretary's physical appropriation of Petitioners' almonds, because this Court has held that the government may not require a person to give up a constitutional right (in this case the right to receive just compensation when property is taken for a public use) in

exchange for a "discretionary benefit conferred by the government" — in this case, the hallow "ability" to dump, at a huge loss, Petitioners' own almonds. *Dolan v. City of Tigard, supra,* 114 S. Ct. at 2316-17; *Loretto* at 439, n. 17.

The fact that the handler can "agree" to become the Secretary's agent, is, legally irrelevant to the issue presented. In *United States v. PeWee Coal Co., Inc.*, 341 U.S. 114 (1951) this Court unanimously held that when the government (in order to avert a nationwide strike of miners) issued an "order for taking possession" of mines and requiring the mine officials to agree to conduct operations as "agents for the government" if they wanted to keep whatever profits were realized (otherwise a government official would operate the mine) committed as much a TAKING "as if the government held full title and ownership." 341 U.S. at 116-117. This Court in *Loretto, supra* treated *PeWee Coal* as a *per se* TAKING. *Loretto* at 431.

Almonds have been grown and marketed in California for hundreds of years. The Almond Marketing Order was issued in 1950. All of the producers cultural costs (which are substantial)[11] have been expended before the producer knows whether the Secretary will issue a reserve for that year since the reserve is not issued until long after the harvest. The handler Petitioner must receive that product, process it, clean it, fumigate it and expend considerable amounts of money processing that product before the Secretary announces the reserve and then makes it retroactive to the beginning of the crop year. A reserve is not imposed every year and there is no set formula in the AMAA or regulations mandating any secretarial action. When the Secretary announces the reserve, he tells the handlers to sell the almonds to him for his school lunch programs (at an economic

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11. The grower Petitioners in this case spent $2,145 per acre, per year in cultural costs (App at 142a).

loss to the handler and the grower), or to dump them into cattle feed or almond butter, an economically worthless venture.[12] If the handler does not do it the Secretary takes physical possession of the property and disposes of it,[13] even though almonds will remain valuable and nutritious through lengthy periods of cold storage and thus available for subsequent "short" crop years.

This Court's TAKINGS cases are not limited to real property. In *Andrus v. Allard*, 444 U.S. 51 (1979) this Court held that the prohibition of the sale of eagle feathers was not a TAKING as applied to traders of bird artifacts. Importantly though, this Court held that "the regulations challenged here *do not compel the surrender* of the artifacts, and there is no physical invasion or restraint upon them. . . . In this case, *it is crucial* that Appellees retain the rights to possess and transport their property, and to donate or devise the protected birds . . . Loss of future profits — *unaccompanied by any physical property restriction* — provides a slender reed upon which to rest a TAKINGS claim." *Id.* at 65-66 (Emphasis added.) *See also, Webbs Fabulous Pharmacy, supra* (money); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (data); *Nixon v. United States*, 978 F.2d 1269, 1276 (D.C. Cir. 1992) (TAKINGS *per se* re

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12. While 7 C.F.R. § 981.66(b) would otherwise authorize exports of almonds as a reserve outlet, for all of the reserve years at issue here the Secretary never authorized exports as an available reserve outlet.

13. The Almond Marketing Order for almonds is unique in this regard, *i.e.*, the "give me your almonds or become my agent and agree to dump them" requirement. Some programs limit the amount that can be grown (*i.e.*, peanuts, 7 U.S.C. § 1358-1), or the amount a handler can acquire from a grower (*i.e.*, spearmint, 7 C.F.R. § 985.52), or limit the amount that can be sold each week (*i.e.*, navel oranges, Valencia oranges and lemons; 7 C.F.R. §§ 907.1 *et seq.*, 908.1 *et seq.* and 910.1 *et seq.*, respectively. The Secretary terminated those three orders on August 26, 1994). But none of the other marketing orders give the Secretary the authority to take possession and control if the product.

regulations applied to the government taking physical custody of President Nixon's presidential papers even though he continued to have access to them and other rights with respect to them).

Unlike *Andrus, supra*, the criteria critically absent in *Andrus* are present here: The surrender of Petitioners' almonds are compelled; there is a physical restraint upon them and they are "held for the account of the Board". Petitioners can "enjoy" temporary physical custody only if they agree to be conscripted as the Secretary's agent and ordered to physically part with them. In *Andrus* this Court stated: "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a TAKING, because the aggregate must be viewed in its entirety." *Id.* at 65-66. In the present case *all* "strands" have been taken. It cannot be disputed that before a reserve is announced all of the almonds belonged to the growers and handlers. After the reserve is announced a percentage of the almonds belong to the Secretary.

As this Court held in *Loretto*: "In short, when the 'character of the governmental action' [citation omitted], is a permanent physical occupation of property, our cases uniformly have found a TAKING to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." (*Loretto*, 458 U.S. at 434).

This Court held in *United States v. General Motors Corporation*, 323 U.S. 373, 378 (1945) that:

> The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the TAKING. Governmental action *short of acquisition of title or occupancy has been*

> *held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a TAKING.*

(Emphasis added.)

In this case, once the reserve is announced there are no "strands" left in the handlers or growers "bundle" of property rights. As the Secretary held, once a reserve is announced, the Almond Board has "plenary" and "complete" power over the reserve, and that "the Board does not have to seek handler approval or concurrence with respect to anything relating to the disposition of the reserve almonds." (App. at 106a). However, the Federal Circuit here never once addressed the nature of the governmental action in this case.

In examining the present case, the "nature of the governmental action" with respect to almond reserve requirements, it is obvious that the government is not just operating a program which adjusts the benefits and burdens of economic life for the "common good", or merely reducing the value of the product through their Commerce Clause powers. In this case ". . . the TAKING was as clear as if the government held full title and ownership." *United States v. PeWee Coal Company, supra,* 341 U.S. at 116-117 (and cited in *Loretto, supra,* 458 U.S. at 431. Also, when a reserve is announced the handler is required to give acquiescence to the property to the Secretary unless he signs an Agency agreement. "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). The Federal Circuit just never addressed the "character" of the governmental action.

Thus, the Federal Circuit's decision clearly conflicts with this Court's *per se* TAKINGS cases, like *Loretto, PeWee Coal, Florida Power and General Motors.*

3. The Federal Circuit's analysis in this case with respect to a "regulatory TAKING" absolutely conflicts with this Court's decision in *Dolan v. City of Tigard, supra*, which held that the regulations must "substantially advance [a] legitimate state interest", *i.e.* its not enough that they might or could advance such interest. *Id.* at 2316.

The reason for the reserve regulations in this case is purportedly for "orderly marketing" and to raise parity prices for farmers. The fact that the Secretary may have had a rational basis for believing when he set the reserve that it would have that affect (and therefore be in compliance with the Administrative Procedures Act), is not sufficient to withstand a "TAKINGS" challenge. This Court in *Dolan v. Tigard*, held that it was not enough for the government to claim that it had a reasonable basis for believing that the regulation would advance its interest, but the city was required to prove it. *Id.* at 2321-2322.[14]

In the present case, the Federal Circuit never attempted to apply the regulatory analysis initially enunciated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and clarified in *Dolan*. The Federal Circuit merely stuck to its shallow "reasoning" that since Petitioners entered into a regulated industry they could not complain about how the Secretary regulated it, regardless of the nature or harm of the government action in this case. In short, there is no decision

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14. As this Court stated in *Dolan*: "As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, "the findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is likely to, offset some of the traffic demands." [Citations omitted.] "No precise mathematical calculation is required, but the City must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." *Id.* at 2322.

whatsoever from this Court that supports that Federal Circuit's decision, and in fact there are the *Dolan* and *Nollan* cases from this Court that would otherwise denounce it.

In the present case, the matter was decided on cross-motions for summary judgment and on the government's motion to dismiss for failure to state a claim. The United States Court of Federal Claims held, as a matter of law, that the government's motion to dismiss be granted. The first amended complaint at issue here specifically alleged that the reserves ordered by the Secretary did not increase grower prices, but instead drastically reduced revenue (App. at 114a, 116a). Petitioners' uncontroverted facts with respect to its motion for summary judgment stated the same thing (App. at 145a). The government proposed nothing to controvert Petitioners' factual allegation that the imposition of the reserve did not raise parity prices to the growers and, indeed, lowered their revenue. The fact that the Secretary, in promulgating each of the reserves in the years in question might have believed that it would raise grower revenue and create orderly marketing does not at all satisfy the test first addressed by this Court in *Nollan*, and further explained in *Dolan* that there is a regulatory TAKING when the regulations do not "substantially advance [a] legitimate state interest." *Dolan, supra* at 2316. Thus, Petitioners are entitled to a trial on the merits with respect to its regulatory TAKING claim that the reserve regulations did not substantially advance a governmental interest because they did not promote orderly marketing nor increase grower revenue. Thus the Federal Circuit's decision clearly conflicts with this Court's decisions in *Dolan* and *Nollan* and guaranties to muddy the waters of future TAKINGS decisions by that court. The Federal Circuit's point of departure that Petitioners entered into a theretofore regulated industry and therefore have no property rights in the almonds that they grow and sell is not supported by any decisions from this Court, and are contrary to decisions of this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING FILED APRIL 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5084

CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., BROWNS LAKE RANCH, MAC ENTERPRISES, INC., VAN KAY, INC., and DERK VAN KONYNENBURG,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

Appendix A

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate has already issued.

FOR THE COURT,
FRANCIS X. GINHART, CLERK

By s/ Brian P. LeDuc
Associate Chief Deputy

Dated: April 1, 1996

Clerk

cc: BRIAN CLAY LEIGHTON
ROBERT EDWARD KIRSCHMAN, JR.

CAL-ALMOND INC V US, 94-5084
(CFC – 92-477C)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record

APPENDIX B — NOTICE OF ENTRY OF JUDGMENT AND JUDGMENT DATED DECEMBER 20, 1995

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 12/20/95

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs and taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party

awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

cc: BRIAN CLAY LEIGHTON
ROBERT EDWARD KIRSCHMAN, JR.

CAL-ALMOND INC V US, 94-5084
CFC – 92-477C

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5084

CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., BROWNS LAKE RANCH, MAC ENTERPRISES, INC., VAN KAY, INC., and DERK VAN KONYNENBURG,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS *in CASE NO(S).* 92-477C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

DATED DEC 20 1995 RECEIVED FEB 15/96

ISSUED AS A MANDATE: February 12, 1996

APPENDIX C — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED DECEMBER 20, 1995

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5084

CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., BROWNS LAKE RANCH, MAC ENTERPRISES, INC., VAN KAY, INC. and DERK VAN KONYNENBURG,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: December 20, 1995

Before ARCHER, *Chief Judge,* RICH, and CLEVENGER, *Circuit Judges.*

ARCHER, *Chief Judge.*

Appendix C

DECISION

Cal-Almond, Inc., et al. (Cal-Almond) appeal the judgment of the United States Court of Federal Claims dismissing, for failure to state a claim upon which relief can be granted, their action for compensation for a taking under the Fifth Amendment. 30 Fed. Cl. 244 (1994). Cal-Almond are processors ("handlers") and growers of almonds who seek compensation for alleged losses in the value of their crop due to the imposition of almond marketing controls established under authority of the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended. 7 U.S.C. §§ 601-74 (1988 & Supp. 1993). Finding that Cal-Almond suffered no compensable intrusion upon their property interests in their almond crop as a result of these marketing controls, the Court of Federal Claims dismissed their complaint. *We affirm.*

DISCUSSION

I.

Since 1950, almonds have been subject to marketing controls under the AMAA. This case involves marketing orders for the years 1982-85, 1988, and 1990, which required that a percentage of the anticipated crop be held in reserve for sale to non-competitive outlets. The reserve percentage imposed varied from two percent to ten percent. Upon sale of reserve almonds to the non-competitive outlets, the net proceeds were remitted to the handlers.

Cal-Almond filed suit in the Court of Federal Claims claiming that by requiring them to sell almonds in a lower priced market their interests in the almonds were taken under the Fifth

Amendment for which compensation was due. Cal-Almond alleged that they received from the non-competitive outlets approximately five percent of what they could have commanded in the open market, resulting in a loss of several million dollars in product sales. In addition, they requested compensation for several thousand dollars of Almond Board[1] expenses which they were required to absorb. Finally, they complained about the costs associated with storing the almond reserves when some of the reserves were eventually released for sale in competitive markets.

The Court of Federal Claims rejected Cal-Almond's claims for compensation finding that they did not have a property right to market their almonds free of regulation. 30 Fed. Cl. at 247. The court noted that Cal-Almond had entered the almond industry knowing it had been highly regulated for many years, and thus "must be understood to have accepted, as a condition of their continuing presence in that industry, the very mode of regulation about which they now complain." *Id.*

II.

Whether the complaint was properly dismissed for failure to state a claim upon which relief can be granted is a question of law which we review *de novo*. *Gould, Inc. v. United States*, 935 F.2d 1271, 1273 (Fed. Cir. 1991). In reviewing a dismissal for failure to state a claim we assume all well-pled factual allegations are true and make all reasonable inferences in favor of the nonmovant. *Id.* at 1274.

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1. The Almond Board is an industry group comprised of almond growers and handlers created to make recommendations to the Secretary and assist in carrying out the market controls.

Appendix C

As with all takings jurisprudence, we start our analysis with the Fifth Amendment which commands that "private property [shall not] be taken for public use, without just compensation." To be a property interest within the meaning of the Fifth Amendment, the interest at issue must be "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property.' ". *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978). Property rights stem from and are defined by existing rules of law. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

In this case, appellants' property rights and reasonable expectations were limited by the regulatory scheme[2] existing upon their entry into the almond industry. The agriculture industry has long been pervasively regulated — the almond industry itself has been subject to marketing controls for over forty-five years. In highly regulated fields those who enter do so subject to the existing regulations and without an expectation to be free of those regulations. *California Housing Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992) (a savings and loan institution that had "voluntarily subjected itself to an expansive statutory regulatory system" could not have developed a "historically rooted expectation of compensation" for action taken within that regulatory scheme); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir. 1994) (same). The possible restrictions and limitations on the

2. We discern no factual or legal basis for appellants' arguments that the almond reserves should be considered *per se* takings under the principles of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

marketing of almonds that appellants object to were clearly laid out in marketing orders before they entered the industry. Appellants, when entering this regulated field, could have had no reasonable expectation that the applicable regulatory scheme would not be enforced. *Golden Pacific,* 15 F.3d at 1074.

This is not to say that in a highly regulated industry, the government may regulate away all property interests. As with any regulatory scheme, one which goes too far can effectuate a taking. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1992). This is not the case here. Marketing orders similar to those at issue here have existed for many years and they have been tailored to benefit members of the almond industry as well as consumers. Indeed, appellants have received benefits therefrom. 30 Fed. Cl. at 247 n.4 (plaintiffs' "businesses, *as a whole,* have [not] been rendered unprofitable by the Secretary's regulations").

As we have recognized, this sharing of benefits and burdens reduces the power of a taking claim. *Florida Rock Indus., Inc. v. United States,* 18 F.3d 1560, 1570 (Fed. Cir. 1994) ("When there is reciprocity of advantage . . . then the claim that the Government has taken private property has little force. . . ." (citation omitted)); *see also Penn Central,* 438 U.S. at 134-35 (owner of landmark was both burdened and benefited by landmark preservation law). In a closely analogous situation, our predecessor court held that marketing controls survive a takings challenge because they are merely one of the burdens that go along with the benefits of the peanut industry price support program. *Carruth v. United States,* 627 F.2d 1068, 1081 (Ct. Cl. 1980).

Appellants argue that a finding of no taking is tantamount to

a finding that they have no property interest at all in the almonds they grow or handle. The Court of Federal Claims did not find that appellants had *no* property interest in their almonds. Rather, the court found that appellants did not have a property interest to be free of all regulation. Appellants plainly had no reasonable expectation to be free from and receive compensation for the complained of harm. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (takings recoveries are limited "to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime"). Thus, looking at Cal-Almond's property, the right to be free of the challenged regulatory scheme is not within Cal-Almond's bundle of property rights. *California Housing*, 959 F.2d at 958 ("As a consequence of the regulated environment in which [appellant] voluntarily operated, [appellant] held less than the full bundle of property rights. . . ."). Appellants continue to enjoy the same rights and privileges they have enjoyed since entering the industry and remain able to put their almonds to essentially the same use. Thus, the reserve requirements cannot be regarded as interfering with appellants' expectations. *See Penn Central*, 438 U.S. at 136.

APPENDIX D — JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED JANUARY 10, 1994

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-477 C

CAL-ALMOND, INC., A CALIFORNIA CORPORATION, ET AL.,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's opinion of January 5, 1994, granting defendant's motion to dismiss, and directing entry of judgment dismissing the complaint,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

David A. Lampen
Clerk of the Court

By: s/ illegible
Deputy Clerk

January 10, 1994

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs.* Filing fee is $105.00.

APPENDIX E — OPINION OF THE UNITED STATES CLAIMS COURT FILED JANUARY 5, 1994

IN THE UNITED STATES CLAIMS COURT

No. 92-477 C

Filed: January 5, 1994

CAL-ALMOND, INC., a California corporation; GOLD HILLS NUT COMPANY, a California corporation; SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., a California corporation; BROWNS LAKE RANCH, a Partnership consisting of Paul McManis and William Reeves; MAC ENTERPRISES, INC., a California corporation; VAN KAY, INC., a California corporation; and DERK VAN KONYNENBURG,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Just Compensation Clause: Marketing controls, agricultural commodities — Almond growers and handlers have no compensable property interest in marketing almonds free of regulatory controls.

Brian C. Leighton, Fresno, California, and *James A. Moody,* Washington, D.C., for plaintiffs.

Robert E. Kirschman, Jr., with whom were *Assistant*

Appendix E

Attorney General Frank W. Hunger, Director David M. Cohen, Assistant Director Jeanne E. Davidson, Department of Justice, Washington, D.C. *Frank Martin, Jr.,* Office of the General Counsel, Department of Agriculture, Washington, D.C., for defendant.

OPINION

WIESE, Judge.

Plaintiffs Cal-Almond, Inc., Gold Hills Nut Company, and Saulsbury Orchards and Almond Processing, are processors or "handlers" of almonds; the other plaintiffs — Browns Lake Ranch, Mac Enterprises, Inc., Van Kay, Inc., and Derk Van Konynenburg — are growers or producers of almonds. Both groups come together in this suit to seek compensation under the takings clause of the Fifth Amendment for what they allege are losses in crop value imposed upon them through almond marketing controls established by the Secretary of Agriculture acting under the authority of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601-602, 608, 608a-c, 610, 612, 672-674 (1988 & Supp. IV 1992).

The case is presented for decision on the basis of plaintiffs' motion for summary judgment on liability and defendant's cross-motion to dismiss for failure to state a claim upon which relief can be granted. Upon consideration of the parties' positions, as presented to the court both through written briefs and oral argument, it is concluded that defendant's position is correct. We explain below.

Appendix E

FACTS

The Agricultural Marketing Agreement Act of 1937 (AMAA) is one of a number of statutes enacted during the Depression years to assist in the rebuilding of the Nation's economy. The Act seeks to restore and preserve the purchasing power of farmers through the reconstruction and maintenance of orderly marketing conditions for agricultural commodities. 7 U.S.C. §§ 601, 602.

To facilitate this goal, the Act empowers the Secretary to enter into agreements with producers that put into effect marketing controls to govern the supply and distribution of agricultural commodities. 7 U.S.C. § 608c. Such controls, implemented through regulations known as "marketing orders," adopt a variety of mechanisms including restrictions on the quantity and quality product brought to market; differentiations in pricing between primary and secondary markets; and limitations on production among growers. Additionally, marketing orders may provide for producers and handlers to share in the proceeds from the sale of commodity reserves and surpluses and also for the self-funding of commodity research, development, and advertising programs.

Pursuant to the authority set out at § 8c(7)(C) of the AMAA, marketing orders involving fruits, vegetables and other commodities (including dried fruits and nuts) are administered by committees of industry representatives selected by the Secretary from nominees chosen by the community of growers and handlers. One of the tasks for which the industry committees are responsible is submitting marketing recommendations to the Secretary based upon assessments of anticipated crop yields and prospective product demand. Following notice and comment rule making, the Secretary may then adopt these

recommendations as final marketing orders for the crop year in question.

The demand for compensation that we encounter in this case grows out of the almond marketing orders that were issued by the Secretary during the crop years 1982 through 1985 and also 1988 and 1990.[1] In each of these years the Secretary, acting on the basis of recommendations provided by the Almond Board of California — the industry group established by the Secretary's almond regulations, *see* 7 C.F.R. § 981.30 (1993)[2] — ordered that a percentage of the anticipated crop be set aside, *i.e.*, held in reserve, for sale to non-competitive outlets such as school lunch programs, charitable institutions, and producers of animal and poultry feeds. The reserve percentage varied from year to year, ranging from a low of two percent in 1982 to a high of thirty-five percent in 1990. (The thirty-five percent figure was subsequently modified, through incremental reductions authorized over the course of the crop year, to a final figure of seven percent).

Under the terms of the almond marketing order,

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1. Almonds became subject to marketing controls in 1950 at the urging of the California Almond Growers Exchange, a growers' cooperative now known as Blue Diamond.

2. The Almond Board of California is comprised of ten members: five producers and five handlers. Representation on the Board is divided between independent growers and handlers and cooperative growers and handlers on the basis of crop tonnage, *i.e.*, majority control is given over to that group responsible for growing and handling more than fifty percent of the tonnage delivered during the previous crop year. 7 C.F.R. §§ 981.30-981.32. In 39 of the 43 years since the creation of the Almond Board, majority control has resided with Blue Diamond

implementation of the set-aside requirement is accomplished through restrictions on distribution: each handler is required to withhold from sale in the open market of a percentage of the almonds under its control equal to the specified reserve percentage. 7 C.F.R. § 981.50. To satisfy this obligation, a handler may either (i) deliver the required percentage to the Almond Board for sale into non-competitive channels, with the net proceeds of the sale being remitted to the handler, 7 C.F.R. §§ 981.51, 981.66(a), (g), or (ii) retain the reserve almonds and, at the same time, enter into an "agency agreement" with the Almond Board agreeing to dispose of the almonds in non-competitive outlets. 7 C.F.R. § 981.67.

In addition to making handlers the focal point of distribution control, almond marketing orders also place upon handlers responsibility for the administrative expenses of the Almond Board. These expenses are addressed through Board-imposed assessments levied on all almonds that a handler has received for its own account. 7 C.F.R. § 981.81.

The two aspects of the almond marketing order just described — the reserve mechanism and the handler's liability for the administrative expenses of the Almond Board — are the matters that have prompted the suit. More specifically, during the crop years in issue, the sale of almonds into the off-market often returned less than ten cents per pound in contrast to an open market price that ranged from $1.10 per pound to approximately $2.00 per pound. On the basis of this difference in price, plaintiffs maintain that the reserve system has forced upon them losses of several million dollars in product sales. Additionally, they say they have been required to absorb several thousand dollars of administrative expenses related to the activities of the Almond Board. In toto, the amount claimed approaches 5 million

dollars.[3] These facts, plaintiffs contend, establish a taking of their property.

DISCUSSION

In considering plaintiffs' claim, we start with what is not in dispute. Plaintiffs concede that the Government has authority, under the Commerce Clause, to regulate the sale and marketing of almonds. They acknowledge also that the manner in which that authority was exercised in this case is consistent with the Secretary's statutory mandate. Nevertheless, plaintiffs contend that the scheme of regulation that we encounter here amounts to a *per se* taking because it effects a displacement, in favor of the Secretary, of virtually all of a handler's property rights in the almonds held in reserve; hence, a confiscation.

To support this contention, plaintiffs point out that once a reserve is announced, the Secretary's regulations grant the Almond Board plenary authority to (i) sell or dispose of the almonds involved, (ii) permit a handler's disposition of the almonds only when acting in the capacity of an agent of the Almond Board, and (iii) bar sale of the almonds in normal trade channels. Furthermore, it is noted that while a handler retains a

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3. On a cumulative basis, the almond reserve requirements imposed during the years in issue involved in excess of 3 million pounds. Of this total reserve amount, approximately 2.2 million pounds is attributable to Saulsbury, roughly 1.1 million pounds is attributable to Cal-Almond and over 500,000 pounds is attributable to Gold Hills. In terms of dollars lost, Cal-Almond and Saulsbury each assert economic injury of approximately $2 million while Gold Hills claims a direct adverse effect of almost $200,000. Additionally, plaintiffs say the growers suffered unrecovered farming costs approximating $200,000.

right to the proceeds from these market-restricted sales, the amounts recovered are seldom sufficient to meet the commodity's purchase and storage costs. On the basis of these considerations, plaintiffs maintain that the Government has relegated unto itself the most essential attribute of commodity ownership — control over disposition — while leaving plaintiffs in the position of having to accept whatever value such disposition might yield, no matter how minimal. This realignment of ownership rights plaintiffs call a *per se* taking.

The second argument plaintiffs present looks beyond the mechanics of the reserve system and focuses instead on the economic consequences of that system. Plaintiffs contend that even if the court does not accept the claim of a *per se* taking, nevertheless, the reserve system deprives a handler of substantially all economic value in the almonds placed in reserve and therefore amounts to a taking by regulation.

Defendant urges us to reject these arguments on the ground that neither is analytically sound. Each of these arguments, defendant contends, requires as its logical antecedent a property right permitting plaintiffs to market their almonds free of regulatory controls. Defendant argues that plaintiffs do not have such a right and thus have suffered no compensable intrusion upon their interests in the almond crop. We agree with defendant.

Government regulation of the almond industry in the manner herein described has been a fact of life for now well over forty years. Thus, parties, like our plaintiffs, who have been active participants in that industry throughout that time, must be understood to have accepted, as a condition of their continuing presence in that industry, the very mode of regulation about which they now complain. One who "embarks in a business

which public interest demands . . . be regulated . . . must know regulation will ensue." *Nebbia v. New York*, 291 U.S. 502, 534 (1934).

Plaintiffs do not escape the consequences of this result by claiming, as they do, that the Secretary's regulations go beyond what reasonably could have been anticipated at the outset. On more than one occasion, the Supreme Court has declared that commercial dealings subject to regulatory control must contend with the possibility that the "legislative scheme [may be] buttressed by subsequent amendments to achieve the legislative end." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986) (quoting *F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 91 (1958)). Indeed, only recently, in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992), the Court reiterated that "by reason of the State's traditionally high degree of control over commercial dealings, [an owner of personal property] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale."

What underlies this rule is the Government's plenary authority over commerce. That authority, where it exists, has been described as "complete and perfect." *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 569 (1939). Given, therefore, the pervasive presence of the Federal Government in the regulation of American agriculture during the past half-century, plaintiffs cannot reasonably assert a property interest in their almond crops free of Government control. The Government's power to regulate the flow of agriculture products affecting interstate commerce is a pre-existing limitation on

plaintiffs' property interest in their almonds. The legitimate exercise of that power cannot give rise to a taking claim.[4]

CONCLUSION

Property rights are created and defined " 'by existing rules or understandings that stem from an independent source such as state law.' ". *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 494 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The plaintiffs in this suit can point to no existing rules or understandings that would give substance to their claim that, because of the marketing constraints imposed upon them by the Government's exercise of its power over interstate commerce, they are entitled to compensation.

Plaintiffs have failed to state a claim on which relief can be granted. Accordingly, we grant defendant's motion to dismiss and direct the entry of judgment dismissing the complaint.

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4. In deciding this case on the single ground discussed in the opinion, we do not mean to signify agreement with plaintiffs' view that the almonds held in reserve represent a separable component of property, distinct from the remainder of the annual crop. To the contrary, for Fifth Amendment purposes, "property" may not be defined more narrowly than the investment-backed expectation supporting it. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-99 (1987). It is at least arguable, therefore, that correctly defined, plaintiffs' "property" consists of the *entirety* of their respective annual crops. Pursuing this definition would, presumably, moot any claim to compensation since plaintiffs do not contend that their businesses, *as a whole*, have been rendered unprofitable by the Secretary's regulations. .

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED DECEMBER 22, 1993

CAL-ALMOND, INC., a California corporation
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
Defendant-Appellee.

CAL-ALMOND, INC., a California corporation, Saulsbury Orchard and Almond Processing, Inc., Carlson Farms, a sole proprietorship
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
Defendant-Appellee.

CAL-ALMOND, INC., a California corporation, Gourmet Packing Co., a California corporation, Gold Hills Nut Co., Inc., a California corporation
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
Defendant-Appellee.

CAL-ALMOND, INC., a California corporation, Gold Hills Nut Co., Inc., a California corporation
Plaintiffs-Appellants,

Appendix F

v.

UNITED STATES of America
Defendant-Appellee.

Nos. 92-16033, 92-16034, 92-16031 and 92-16527.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 12, 1993.
Decided Dec. 22, 1993.

* * *

Brian C. Leighton, Clovis, CA, for plaintiffs-appellants.

Jeffrica Lee, U.S. Dept. of Justice, Washington, DC, for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before. CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

Two groups of almond handlers are challenging various provisions of the California Almond Marketing Order, which regulates the California almond handling industry. Both groups challenge the United States Department of Agriculture ("USDA") almond marketing program administered by the California Almond Board (the "Board"). The first group is also separately challenging the assessment imposition procedure used by the Board from 1980 to 1986. The from 1980 to 1986.

Appendix F

The second group is separately challenging the validity of the reserve requirement rules for the crop years 1988-89 and 1990-91. The district court affirmed a USDA Judicial Officer decision upholding the Almond Marketing Order against these challenges, and the handlers appeal. We affirm the district court's decision on the assessment imposition procedure and the reserve requirement rules, but hold that the First Amendment rights to freedom of expression and association.

I. THE ALMOND MARKETING PROGRAM

A. Facts and proceedings below.

Appellants Cal-Almond, Saulsbury Orchards, and Carlson Farms are "handlers" f California almonds. They receive almonds from growers, process them, and sell the resulting product, primarily for use as ingredients in candy, ice cream, and cereal. Cal-Almond and Saulsbury also operate mail-order businesses through which they sell whole almonds.

The California almond handling industry is regulated by the Almond Marketing Order, 7 C.F.R. Sec. 981 (the "Order"). The Order was established in 1950 by USDA pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. Sec. 608c (the "Act"). The purpose of the Act is to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce" as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. Secs. 602(1), 602(4) (1988). The Act authorizes the Secretary of Agriculture (the "Secretary") to issue, following notice and an opportunity for hearing, marketing orders that will "tend to effectuate the declared policy of [the Act]" with respect to the particular commodity. 7 U.S.C. Sec. 608c(4) (1988).

Appendix F

The Order is administered by the Board, which has the power to "make rules and regulations to effectuate the terms and provisions" of the Order. 7 C.F.R. Sec. 981.38 (1993). The Board has ten members, all of whom are industry representatives appointed by the Secretary. The Board engages in a variety of activities, including research and development, marketing, quality control, and volume regulation. The Act specifically provides that the Order may establish "marketing research and development projects designed to assist, improve, or promote the marketing" of almonds. 7 U.S.C. Sec. 608c(6)(I) (1988). Pursuant to this authorization, the Board funds a generic pro-almond public relations program, consisting of such items as newspaper inserts containing almond recipes, leaflets and magazine articles about the benefits of almonds, promotional materials for school lunch programs, and press kits for industrial customers.

The money to pay for the Board's activities, including the marketing program, comes from assessments collected from handlers, based on the volume of almonds they handle. However, the Act and the Order provide that a handler's assessment will be reduced, up to a point,[1] by the amount that the handler spends on authorized advertising.[2] Before a handler can

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1. A handler may receive credit against his assessment in an mount not to exceed "that portion of his assessment designated for marketing promotion including paid advertising." 7 C.F.R. Sec. 981.41(c) (1993). For example, for the 1986-87 crop year, the overall assessment was 2.6cents per pound, and the maximum credit was 2.5cents per pound.

2. The Act provides that handlers may receive credit "for such marketing promotion including paid advertising as may be authorized by the [O]rder." 7 U.S.C. Sec. 608c(6)(I) (1988). The Order authorizes the Board,

(Cont'd)

receive credit for his marketing promotion expenditures, the Board must determine that such expenditures meet the requirements of the "creditable advertising regulations" set forth in 7 C.F.R. Sec. 981.441.

The Order thus establishes an overall almond marketing program, which combines generic almond promotion conducted by the Board with Board-approved handler advertising. Beginning in 1984, appellant Saulsbury, which strongly opposed this program, refused to pay its annual assessments to the Board. In 1986, the United States sought an injunction in federal district court, pursuant to 7 U.S.C. Sec. 608a(6), to compel payment of some $300,000 in assessments which Saulsbury allegedly owed and had not paid to the Board. Saulsbury Orchards and Almond Processing, Inc. v. Yeutter, 917 F.2d 1190, 1193 (9th Cir. 1990). The district court granted summary judgment in favor of the government, and ordered Saulsbury to comply with the Order and pay the assessments. Id. The court refused to entertain Saulsbury's affirmative First Amendment defenses because it found that Saulsbury had not exhausted its administrative remedies pursuant to 7 U.S.C. Sec. 608c(15)(A).

In April 1987, Saulsbury, joined by appellants Cal-Almond and Carlson Farms, filed an administrative petition, pursuant to 7 U.S.C. Sec. 608c(15)(A), challenging numerous parts of the Order (including the almond marketing program) for the crop

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(Cont'd)

with the approval of the Secretary, to provide "for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products, or their uses." 7 C.F.R. Sec. 981.41(c) (1993).

years 1980-87.[3] Following a hearing in the summer of 1989, a USDA administrative law judge ("ALJ") issued a decision on June 22, 1990 upholding some of appellants' challenges but rejecting others, including the challenge to the marketing program. Both sides appealed the ALJ's decision to the USDA Judicial Officer ("JO"). On January 23, 1991, the JO upheld the Order in all respects.

Meanwhile, Cal-Almond had filed another petition pursuant to 7 U.S.C. Sec. 608c(15)(A), challenging a specific section of the creditable advertising regulations, 7 C.F.R. Sec. 981.441(c)(2), for the crop year 1988. The ALJ upheld the challenge, but his decision was reversed by the JO. The two petitions were consolidated for cross-motions for summary judgment to the district court. On June 3, 1992, the district court issued an order upholding the JO's decisions in their entirety. Appellants appeal this order.

B. Standard of review.

We review de novo a district court's grant of summary judgment. T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir.1987). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir.1989).

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3. Saulsbury, believing that it would suffer irreparable injury if it were forced to exhaust its administrative remedies, also filed a complaint in district court, again alleging that the Order was unconstitutional. The district court again dismissed the action on the ground that Saulsbury had failed to exhaust its administrative remedies. Saulsbury, 917 F.2d at 1193. We affirmed the dismissal in Saulsbury. Id. at 1197.

Appendix F

C. Discussion.

1. Infringement on appellants' First Amendment rights.

The district court held that the almond marketing program did not even implicate, let alone violate, appellants' First Amendment rights, "because plaintiffs are not 'compelled' to advertise." However, while the Order clearly does not compel appellants to advertise, it does compel them to expend a certain sum of money every year, on either assessments or creditable advertising. Since either alternative burdens appellants' First Amendment rights, these rights are clearly implicated by a program containing both.

Assume first that the creditable advertising regulations did not exist and that handlers paid the full amount of their assessment to the Board. A substantial portion of that amount would be used by the Board for the generic almond promotion program, which infringes on appellants' First Amendment right to be free from compelled speech and association. See United States v. Frame, 885 F.2d 1119 (3d Cir.1989), cert. denied, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990). Frame involved a First Amendment challenge to the Beef Promotion and Research Order, 7 C.F.R. Secs. 1260.101-.217, promulgated by USDA pursuant to the Beef Promotion and Research Act, 7 U.S.C. Secs. 2901-11. The Beef Promotion Order established a "Cattlemen's Board," whose goal would be to increase beef sales, and authorized it to collect an assessment of $1.00 per head of cattle from cattle producers and importers. Id. at 1122-23. Frame, a cattle breeder and auctioneer, refused to pay the assessment, and, when sued by the federal government, asserted that the Beef Promotion Act violated his First Amendment rights of free association and free speech. Id. at 1129.

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The Third Circuit noted first that citizens arguably do not have the right to refuse to support financially government programs that involve speech they find objectionable. Id. at 1131. However, the court also found that the promotional expression sponsored by the Cattlemen's Board could not properly be characterized as "government speech"

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes . . . This sort of funding scheme [establishes a] close nexus between the individual and the message funded.

Id. at 1132 (citations omitted) (emphasis added). The court found that the Beef Promotion Act implicated Frame's First Amendment rights because it resembled other funding schemes that the Supreme Court had held to implicate individuals' First Amendment rights. Id. at 1132-33, citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)

(union-management agency shop agreements, which require that every employee pay the union a service charge equal in amount to union dues, impinge on employees' rights to be free from compelled affirmation of belief and compelled association for expressive purposes) and Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (state law requiring citizens to bear state slogan, "Live Free or Die," on automobile license plates, implicates First Amendment rights because law requires individuals to participate in the dissemination of an ideological message).

The Board's almond promotion program closely resembles the beef promotion program at issue in Frame. In both cases, a "publicly identified group" (cattlemen or almond handlers) must contribute money to fund the "dissemination of a particular message associated with that group." For the same reason that the beef program implicated Frame's First Amendment right to be free from compelled speech and association, then, the Board's promotional efforts implicate appellants'.

Assume next that the Order imposed on handlers no assessment or other compelled contribution to the Board whatsoever, but only required that they spend the equivalent sum every year on advertising that met the requirements of 7 C.F.R. Sec. 981.441. Such an Order also would clearly implicate appellants' First Amendment rights, both because it would compel them to speak and because it would impose content-based restrictions on that speech. See Wooley, 430 U.S. at 714, 97 S.Ct. at 1435 ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

Thus, both an assessment-only program and an advertising-

only program would implicate appellants' First Amendment rights. Because the Order is a combination of both, it implicates those rights as well. USDA's argument that the creditable advertising regulations do not implicate those rights because they do not "compel" appellants to advertise ignores the fact that if handlers do not advertise according to the regulations, they must contribute their assessment to the Board,[4] which is itself a type of compulsion implicating appellants' First Amendment rights.

2. Type of speech restricted.

Having determined that the almond marketing program implicates appellants' First Amendment rights, we must now select the proper standard to evaluate the constitutionality of the program. Appellants claim, and we agree, that the program infringes on both their right to free speech and their right to free association. The Supreme Court has established different tests for each of these. Restrictions on lawful and non-misleading commercial speech[5] are evaluated using the three-prong

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4. Handlers may also earn credits by engaging in other promotional activities, such as distributing sample packages of almonds to charitable or educational outlets, purchasing promotional materials available from the Board, or certain direct mail promotions. 7 C.F.R. 981.441(d)(1)(i)-(iii) (1993). The availability of such options does not change the First Amendment analysis; they simply represent other types of expressive activity the only alternative to which is the compelled assessment. In practice, the "vast majority" of creditable advertising expenditures are spent on advertisements and not on these alternatives.

5. "Commercial speech" is that which "propose[s] a commercial transaction." Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986) (quotation

(Cont'd)

standard of Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). First, the asserted government interest behind the restrictions must be "substantial." Id. at 566, 100 S.Ct. at 2351. Second, the restrictions must "directly advance[ ] the governmental interest asserted." Id. Third, the restrictions must be "not more extensive than is necessary to serve that interest." Id.

Government programs that compel association are evaluated under a more stringent standard. The Supreme Court has recognized that "[f]reedom of association . . . plainly presupposes a freedom not to associate." Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984). See also IDK, Inc. v. Clark County, 836 F.2d 1185, 1192 (9th Cir.1988) ("[t]he first amendment . . . gives us the freedom not to assemble with those whose goals we do not share."). In Roberts, the Supreme Court held that infringements on the right of free association must be "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Roberts, 468 U.S. at 623, 104 S.Ct. at 3252. The Frame majority applied this test to the Beef Promotion Act. See Frame, 885 F.2d at 1134. However, because we hold the almond marketing program unconstitutional even under the less stringent Central Hudson standard, we do not decide which of these two should apply. See id. at 1146 (Sloviter, J., dissenting).

(Cont'd)
omitted). All of the promotional efforts undertaken by the Board, whether directly (through its own activities) or indirectly (through the inducements of the creditable advertising regulations), are aimed at increasing almond sales. The program therefore deals with commercial speech.

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Appellants contend that their own almond advertising contains a mixture of commercial and political speech and is therefore entitled to a higher level of protection under Riley v. National Fed'n of Blind, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Riley addressed a First Amendment challenge to a North Carolina requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity. Id. at 795, 108 S.Ct. at 2676-77. The Supreme Court found the regulation unconstitutional under strict scrutiny. Id. at 798, 108 S.Ct. at 2678. The Court applied strict scrutiny because although the speech at issue was arguably commercial, and thus subject to a more deferential standard of review, "the speech [does not] retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech"—in that case, charitable solicitation. Id. at 796, 108 S.Ct. at 2677 (emphasis added).

In the present case, however, the commercial speech, although arguably "compelled," is not inextricably intertwined with higher-value noncommercial speech. Appellants' political appeals are not essential components of their advertisements. "[A]dvertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 n. 7, 105 S.Ct. 2265, 2274 n. 7, 85 L.Ed.2d 652 (quotation omitted).

Thus, the Riley rationale for applying strict scrutiny is not present here.

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3. Application of the Central Hudson test.

Once again, for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be "substantial," (b) the program must "directly advance" that interest, and (c) the program must not be more extensive than necessary to serve that interest. Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. Edenfield v. Fane, __ U.S. __, __, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

(a) Substantial government interest.

We "must identify with care the interests the State itself asserts." Edenfield, at __, 113 S.Ct. at 1798. USDA claims that the government has a "compelling and important interest in promoting the consumption of almonds" in order to "provide for greater stability in the products of agriculture" and "protect the income of farmers." Brief for the Appellee at 32. The Act itself states that the purpose of the creditable advertising program is to "assist, improve, or promote the marketing, distribution, and consumption of [almonds]." 7 U.S.C. Sec. 608c(6)(I) (1988). See also 36 Fed.Reg. 20,887, 20,888 (1971) (the program will "provide an additional method of stimulating almond consumption"); 35 Fed.Reg. 7428, 7432 (1970) (the program will provide the "opportunity to stimulate the demand for almonds"). We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest. See Frame, 885 F.2d at 1134 (government has a compelling interest in "maintaining and expanding beef markets" in order to

"prevent[ ] further decay of an already deteriorating beef industry).

(b) Direct advancement of the interest.

Next, USDA must show that the program "directly advances the governmental interest asserted." Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351. "[T]he regulation[s] may not be sustained if [they] provide[ ] only ineffective or remote support for the government's purpose." Id. at 564, 100 S.Ct. at 2350. Furthermore, we may not simply defer to legislative and executive judgment on this question; we must determine ourselves whether the program directly advances USDA's asserted interests. City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n. 22, 104 S.Ct. 2118, 2127 n. 22, 80 L.Ed.2d 772 (1984). We apply this test first to the creditable advertising regulations specifically, and then to the overall almond promotion program.

Because the Order forces each handler to fund Board promotional efforts with every assessment dollar not spent on creditable advertising, USDA must show both that the advertising for which credit is granted is better at selling almonds than the Board's own efforts and that the advertising for which credit is denied is worse at selling almonds than the Board's own efforts. As a starting point for our analysis, therefore, we must determine how effective the Board's own almond promotion efforts are. USDA has presented little solid evidence on this question. The following exchange, which occurred at the hearing before the ALJ between counsel for Cal-Almond and Skip Hubbard, chairman of the Board's Public Relations and Advertising Committee, is highly instructive:

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Q: [H]as the Public Relations and Advertising Committee since you have been chairman, ever hired somebody to analyze whether or not the creditable advertising rules and the assessment amount spent on advertising, have caused more sales of almonds?

A: It has not been—we have not ha[d] a survey conducted.

Q: So would it be safe to say that you don't have any empirical data as to whether or not the advertising assessments have assisted in the . . . sale and consumption of almonds?

A: No study has been made on that.

Q: Has any study been made as to whether or not certain provisions of section 981.441 have created more sales or less sales than other provisions?

A: We have not commissioned any study for that. [. . .]

Q: [. . .] Has the Almond Board, the Public Relations and Advertising Committee, ever made a determination as to whether or not the advertising itself, or the promotion itself, done by the Board has increased grower returns?

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A: The Committee believes that the promotional activities are beneficial to grower returns.

Q: [. . .] Has any study been conducted?

A: No.

Transcript of 1/25/90 hearing before USDA ALJ Hunt at 158-60.[6] Because USDA has presented little or no evidence regarding the effectiveness of the Board's promotional efforts, it cannot show that the creditable advertising regulations "directly advance" the government's interest in increased almond sales by enhancing the effectiveness of those efforts.[7] See Edenfield, __ U.S. at __, __, 113 S.Ct. at 1800 (Florida Board of Accountancy

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6. Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that a professor at the University of California-Davis had conducted a study whose results demonstrated that the advertising program had been successful in increasing grower returns. However, this study is not part of the record.

7. USDA asserts that creditable advertising may "reasonably be expected to increase the sale of almonds," Brief for the Appellee at 31, and cites to the rule-making records underlying the regulations to support its assertion. However, these records address only minor amendments to the regulations made during the past decade, and not to the initial adoption of the bulk of the regulations, including the most restrictive ones. See, e.g., 49 Fed.Reg. 19,978 (May 10, 1984) (increasing the amount of credit handlers receive for advertising almond butter); 50 Fed.Reg. 16,451 (April 26, 1985) (doubling the portion of creditable advertising that may be carried over from one crop year to the next); 52 Fed.Reg. 13,427 (April 23, 1987) (allowing credit for the cost of purchasing mailing lists, envelopes and postage used in mail order promotions).

fails to justify ban on personal solicitation of prospective business clients by accountants when it provides no studies or anecdotal evidence suggesting that such solicitation creates the asserted dangers of fraud, overreaching, or compromised independence).

In fact, most of the evidence in the record indicates that the regulations hinder the handlers' efforts to increase sales and returns to growers. For example, most of appellant Saulsbury's sales were to cereal companies, but Saulsbury could not receive credit for advertising the cereals containing its almonds because the regulations deny credit for products that do not contain at least 50 percent raw shelled almonds by weight and do not display the handler's brand. See 7 C.F.R. Sec. 981.441(c)(3)(iv). When a chain of mini-markets in the Boise, Idaho area agreed to carry Saulsbury almonds, Saulsbury could not receive credit for advertisements directing consumers to those stores becausethe regulations deny credit for advertisements directing consumers to retail outlets not "operated" by a handler. See 7 C.F.R. Sec. 981.441(c)(5)(iii).

Because of these restrictions, Saulsbury estimated that every dollar spent on creditable advertising returned less than fifty cents in sales.

Cal-Almond's experience with the regulations was similarly disappointing. Cal-Almond exports approximately 90 percent of its almonds for use as ingredient items, and nearly all of the almonds it sells domestically are used in ice cream. However, like Saulsbury and cereal, Cal-Almond cannot obtain credit for advertising this ice cream because the regulations forbid it. The only creditable advertising of any use to Cal-Almond is that promoting its mailorder business, which is not a

profitable undertaking.[8] Overall, the evidence indicates that the regulations hinder, rather than help, appellants' efforts to sell their almonds.

Finally, there is no evidence that the regulations stimulate additional or more effective advertising from other handlers. Blue Diamond is by far the largest handler and overwhelmingly dominates the retail market;[9] to "directly advance" the government interest in increasing almond sales, the regulations would have to give Blue Diamond an incentive to advertise more.

The record indicates, however, that they do not. Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that Blue Diamond would "probably" continue to spend just as much money advertising even if the regulations did not exist. Walter Payne, Blue Diamond's vice president for sales, marketing and distribution, testified that Blue Diamond would advertise the same amount and in the same manner in the absence of the regulations.

In sum, the record indicates that the regulations do not stimulate additional or more effective advertising from Blue Diamond. Appellants have presented evidence showing that the regulations hinder their own marketing efforts, and USDA has presented no evidence that the regulations assist the efforts of other handlers. Therefore, we hold that the regulations do not "directly advance" the government's asserted interest in

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8. For example, in 1987 Cal-Almond spent nearly $300,000 advertising the business but its gross mail order sales were less than $100,000.

9. As of July 1987, Blue Diamond had a 92 percent share of almonds sold in grocery stores.

increased almond sales and are therefore an unconstitutional restriction on appellants' First Amendment rights.

Whether the entire assessment-funded almond promotion program "directlyadvances" the governmental interests in increased almond sales and returns to growers is a more difficult question. The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised. See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) ("[w]e think [that] the legislature's belief [that advertising of casino gambling would serve to increase the demand for the product advertised] is a reasonable one"); Central Hudson, 447 U.S. at 569, 100 S.Ct. at 2353 ("[t]here is an immediate connection between advertising and demand for electricity."). Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand (although, as noted above, the Board does not know how significant the effect is).

However, because these efforts are funded with money that handlers would presumably have spent on their own advertising, we cannot compare the Board's program with a no-advertising situation; we must compare it to a situation where handlers spent their assessments on their own marketing. USDA has presented no evidence tending to show that the generic Board promotion financed by that money sells almonds more effectively than the specific, targeted marketing efforts of individual handlers.[10] We

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10. Once again, appellants have presented evidence to the contrary. Cloyd Angle, the president of Cal-Almond, testified that the best way for him to sell almonds is to bring potential customers to his plant and show them the cleanliness and efficiency of his processing facilities. Spending money on generic Board promotion does not help him do this.

agree with appellants' argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson. The USDA has failed to meet its burden of showing that the overall almond marketing program "directly advances" its stated goals of selling more almonds and increasing returns to producers.[11]

(c) Not more extensive than necessary.

USDA must prove that the regulations are no more extensive than necessary to serve the interest of increasing almond sales. The Supreme Court held in Board of Trustees of State Univ. v. Fox that this standard is not as strict as a "least restrictive means" test:

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective.

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11. The Frame majority held that mandatory assessments to the Cattlemen's Board advanced the goals of the Beef Promotion Act because they "prevent[ed] 'free riders' from receiving the benefits of the promotion and research program without sharing the cost." Frame, 885 F.2d at 1135. USDA could make a similar argument here (although it has not). Such a conclusion, however, presumes that the promotion itself advances the goals of the Act, a presumption that we have rejected.

492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989).

USDA asserts that "[a]lthough it is possible that some forms of advertising, though ineligible for credit, might also increase the sale of almonds, the regulations reflect a reasonable judgment that the Board will make better use of those monies in its market promotion programs." However, once again, USDA offers no evidence in support of this "reasonable judgment." It certainly seems reasonable to assume that the advertisements for which credit is explicitly permitted—generic advertisements, expenditures for advertisements announcing future promotion activities, and in-store supermarket advertisements—will increase almond sales. However, USDA offers no justifications for the restrictions that deny credit for certain advertisements: ads promoting more than two complementary branded products (Sec. 981.441(c)(5)(i)), ads promoting a product that also has "competing nuts" (Sec. 981.441(c)(5)(ii)), or ads promoting retail stores not owned by handlers (Sec. 981.441(c)(5)(iii)). It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. This court has interpreted Fox as holding that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." Project 80's, Inc. v. City of Pocatello, 942 F.2d 635, 638 (9th Cir.1991). The creditable advertising regulations disregard such means, and therefore are more extensive than necessary to serve the interest of increasing almond sales. As the USDA has failed to present sufficient evidence to satisfy the requirements of the Central Hudson test,

the Almond Marketing Program violates appellants First Amendment rights.

II. THE ASSESSMENT IMPOSITION PROCEDURES

A. Facts and proceedings below.

As noted above, the funds required to finance the Board's activities are generated through assessments authorized by the Act. The Order specifically provides that the assessment shall be "such rate per pound of almonds ... received by [the handler] for his own account ... as the Secretary finds is necessary to provide funds to meet the authorized [B]oard expenses and the operating reserve requirements." 7 C.F.R. Sec. 981.81(a) (1993).

For the crop years 1980 through 1986, USDA issued final rules containing budget estimates and assessment rates without first publishing a proposed rule and requesting comments. Appellants contend that this procedure violated the rule making requirements of the Administrative Procedure Act (APA), which requires "[g]eneral notice of proposed rule making ... unless persons subject thereto are named and either personally served or otherwise have actual notice thereof." 5 U.S.C. Sec. 553(b) (1988) (the "notice" requirement). The agency is also required to give "interested persons an opportunity to participate in the rule making" (the "comment" requirement) and "[a]fter consideration of the relevant matter presented . . . incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. Sec. 553(c) (1988). In addition to the time required for the notice-and-comment procedure, an additional thirty days must pass between the time the final rule is passed and the time it takes effect. 5 U.S.C. Sec. 553(d) (1988).

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Following appellants' administrative challenges to the assessment imposition procedure,[12] the ALJ found that notice and comment pursuant to the APA should have been allowed. The JO disagreed and ruled that "good cause" existed for dispensing with notice and comment because the Secretary had discretion to authorize such expenses as were reasonable and likely to be incurred and because arriving at the assessment rate was a ministerial and mechanical calculation. The district court agreed with the JO.

B. Discussion.

1. Notice and comment.

We review de novo "the district court's determinations on issues of statutory interpretation, including the scope of the notice-and-comment and publication requirements imposed by the APA." Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1011 (9th Cir.1987). We hold that although the assessments are "rules" subject to the notice-and-comment requirement of the APA, the Secretary's failure to give notice and request comments was harmless.

The APA defines a "rule" as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the

12. Outlined in section I.A. above.

> approval or prescription for the future of rates.

5 U.S.C. Sec. 551(4) (1988) (emphasis added). We agree with appellants that establishing an assessment is a "prescription for the future of rates." The Order itself defines the assessment as a "rate per pound of almonds." 7 C.F.R. Sec. 981.81(a) (1993). USDA's argument that the assessment procedure is not a rule because it is simply the mechanical result of the Secretary's approving an agency's budget fails under the D.C. Circuit's opinion in Batterton v. Marshall, 648 F.2d 694 (D.C.Cir.1980). There, the court held that the exemption for budgetary approval does not apply "where the agency action trenches on substantial private rights and interests." Id. at 708 (footnote omitted). Because the assessment rate directly affects the financial interests of appellants and other almond handlers, it is not exempt from the notice-and-comment requirements of the APA.

The district court held that the Secretary's failure to follow the notice-and-comment procedure was excused by the "good cause" exception to the APA, which excuses such failure

> when the agency for good cause finds (and incorporates the finding and a brief statement of reasons thereof in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. Sec. 553(b)(B) (1988) (emphasis added). The announcement accompanying the rules provided the following justification for dispensing with the notice-and-comment procedure:

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> To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expense and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the [A]ct it is necessary to make these provisions effective as specified.

45 Fed.Reg. 56,794 (1980). USDA contends that since the Board's annual harvest forecast and proposed budget both depend on crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA.[13]

We disagree, based on our opinion in Riverbend Farms Inc. v. Madigan, 958 F.2d 1479 (9th Cir.), cert. denied, __ U.S.__, 113 S.Ct. 598, 121 L.Ed.2d 535 (1992). In Riverbend Farms, handlers of navel oranges challenged the procedure used by the Secretary to set weekly volume restrictions on the marketing of the oranges. We first noted that

> the good cause exception goes only as far as its name implies: It authorizes departure from the APA's requirements only when

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13. The Board recommended assessment rates at the annual July meeting. However, in the years from 1980 to 1986, the earliest the Secretary issued the final rule was August 26 in 1980, and the latest was October 19 in 1982.

> compliance would interfere with the agency's ability to carry out its mission. The agency thus must minimize conflict with the APA by complying with those APA requirements it is capable of complying with.

Id. at 1485. We then held that even though the volume-setting meetings were conducted weekly, the Secretary had no reason not to give notice of them (by means of publication in the Federal Register) or allow written comments before promulgating weekly volume restrictions. Id. at 1486. Because we found no reason in Riverbend Farms to depart from the notice-and-comment procedure for weekly meetings and rules, we can discern no good cause here for the Secretary's failure to follow the procedure for annual meetings and rules.

We also cannot find good cause for the failure to wait thirty days before allowing the rule to take effect. In Riverbend Farms, we noted two reasons for the waiting period: it gives affected parties time to adjust their behavior before the final rule takes effect, and it usually causes no harm. Id. at 1485. These reasons apply to the almonds context. From 1980 to 1986, delaying the effective date of the rules by thirty days would have caused no harm, because the Secretary always waited at least thirty days before adopting a final rule anyway. Furthermore, the thirty days would have given handlers an opportunity to estimate their future costs and prices before the rule went into effect. Therefore, we can see no reason not to follow this requirement, and hold that the Secretary has failed to provide good cause for his failure to follow the procedure mandated by the APA.

However, we find this failure to be harmless. "We have held that the failure to provide notice and comment is harmless only

where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.' " Riverbend Farms, 958 F.2d at 1487 (quoting Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764-65 (9th Cir.1986)). Our harmless error analysis "must therefore focus on the process as well as the result." Id. (emphasis added). In Riverbend Farms, we ultimately concluded that the Secretary's failure to comply with the APA's notice-and-comment requirements in promulgating the weekly navel orange volume restrictions was harmless because the handlers knew that there would be meetings every Tuesday, that proposed restrictions would be contained in a position paper issued prior to the meetings, and that the meetings would provide the opportunity for public comment. Therefore, the handlers were not prejudiced by the Secretary's failure to follow the notice and comment procedure, and the error was harmless. Id. at 1488.

The Secretary's error in the instant case is harmless for the same reasons. The Board holds open meetings in July of each year to gather information relevant to estimating its budget and the resulting assessment rate. During these meetings, the Board receives comments and testimony from any and all interested parties. After deciding on its recommendations, the Board directly notifies each almond handler of the proposed assessment rate. The Board then submits its recommendations to the Secretary for approval; from 1980 to 1986, the assessment rate set by the Secretary in the final rule was the same as the rate that had been recommended by the Board. Therefore, under Riverbend Farms, any error made by the Secretary in not following the notice and comment procedure was harmless.

2. Validity of allegedly "retroactive" assessments.

From 1980 to 1986, the final rules establishing the annual

assessments were not issued by the Secretary until at least several weeks after the beginning of the crop year. However, appellants had by that time already received a significant quantity of almonds, and the assessments were applied to those almonds as well. Appellants claim that doing so transformed the assessments into impermissible "retroactive" rules.

The Supreme Court has noted that administrative rules must be statements that have legal consequences only for the future. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 217, 109 S.Ct. 468, 476, 102 L.Ed.2d 493 (1988) (Scalia, J., concurring). "Retroactive" rules—those that alter the past legal status of past actions—are "not favored in the law." Id. at 208, 109 S.Ct. at 471. However, they are permitted if the power to promulgate them "is conveyed by Congress in express terms." Id. (emphasis added).

We agree with the district court that even if the assessments are retroactive rules, Congress expressly granted the Secretary the power to promulgate them. The Act provides that handlers shall pay assessments for such expenses "as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him." 7 U.S.C. Sec. 610(b)(2)(ii) (1988). Since the Order specifies the crop year to be the relevant "period," the Secretary may impose the assessment on all almonds received during that time. As the district court pointed out,

> [t]he statutory language of Section 610(b)(2)(ii) mandates that each handler's pie volume of all of the commodity covered by the marketing order. The focus of the statute is on the 'expenses likely to be

> incurred . . . during any period specified by [the Secretary].' The period specified by the Secretary is the crop year July 1 through June 30. Therefore, the statute requires a handler to share pro rata in any expenses likely to be incurred by the Almond Board during a crop year.

We hold that even if the assessment rules are "retroactive," they are permissible because they were authorized by Congress in the Act.

3. Statement of basis and purpose.

Appellants contend that the final 1980-1986 assessment rules failed to comply with the substantive requirements of the APA because they did not include a "general statement of their basis and purpose" as required by 5 U.S.C. Sec. 553(c). However, regulations with no statement of basis and purpose have been upheld where the basis and purpose was considered obvious. See Citizens to Save Spencer County v. E.P.A., 600 F.2d 844, 884 (D.C.Cir.1979). This is just such a case. The "purpose" of the assessment is clearly to fund the Board's operations, and the "basis" of the rate is the mechanical application of the statutory formula. Because the basis and purpose of the assessment rate are obvious, no express statement was necessary to comply with the APA.

III. THE RESERVE REQUIREMENTS

A. Facts and proceedings below.

The reserve requirement is the mechanism the Board uses to

regulate the volume of almonds entering the market, pursuant to the Act's goals of protecting almond prices and maintaining an orderly flow of almonds to market. 7 U.S.C. Sec. 608c(6)(A), (C) (1988). Every year, the Board recommends to the Secretary what percentage of the total almond crop should be "salable" and what percentage should be held in "reserve" by handlers. 7 C.F.R. Sec. 981.49 (1993). Handlers may only sell the salable percentage of almonds they receive; they must withhold from marketing an amount equal to the reserve percentage. 7 C.F.R. Sec. 981.50 (1993). The Secretary designates the final percentage based on the Board's recommendation and "any other available information." 7 C.F.R. Sec. 981.47 (1993).

The almond crop year begins on July 1 and ends June 30. 7 C.F.R. Sec. 981.19 (1993). For the 1988 crop year, the Board recommended a 25 percent reserve requirement on July 20, 1988; the Secretary issued a proposed rule incorporating this recommendation on September 16, 1988, allowing 15 days for comment; and issued the final rule establishing the 25 percent reserve requirement on January 25, 1989. For the 1990-91 crop year, the Board recommended a 35 percent reserve requirement; the Secretary issued a proposed rule on August 10, 1990, with the same 15-day comment period; and the Secretary issued the final rule on September 21, 1990.

Appellants Cal-Almond, Gourmet Packing, and Gold Hills filed administrative petitions, pursuant to 7 U.S.C. Sec. 608c(15)(A), challenging the lawfulness of the procedures used by the Secretary to establish the 25 percent reserve requirement for the 1988-89 crop year; the validity of certain actions that the Board and Secretary require handlers to take to comply with the reserve requirement; and the validity of Secretary's imposing assessments on reserve almonds. After consolidation, the ALJ

rejected most of the challenges, but held that the 1988-89 reserve and assessment rules were invalidly retroactive. On appeal, the JO upheld the Secretary's actions in all respects and the district court did the same.

Appellants Cal-Almond and Gold Hills had also filed an administrative petition challenging various USDA actions under the Order for the crop year 1990-91. The ALJ rejected their challenges and the JO affirmed. After appellants filed suit in district court, the parties stipulated that the district court should grant summary judgment for USDA without prejudice to appellants' right to appeal, which the district court did. Appellants appeal both judgments.

B. Discussion.

1. Lawfulness of 1989-90 and 1990-91 reserve obligation rules.

(a) Retroactivity.

Appellants claim that the 1988-89 and 1990-91 reserve obligation rules were unauthorized retroactive rules. We hold that even if the rules were retroactive, they were expressly authorized by Congress and were therefore valid. Georgetown Univ. Hosp., 488 U.S. at 208, 109 S.Ct. at 471-72. The Act provides that marketing orders may contain terms

> [a]llotting, or providing methods for allotting, the amount of [a] commodity. . . which each handler may market . . . under a uniform rule based upon the amounts which each such handler has available for current

> shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity ... to be marketed ... during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

7 U.S.C. Sec. 608c(6)(C) (1988). The focus of the statute is on the total quantity of almonds to be marketed during any period specified by the Secretary—in this case, the July 1-June 30 crop year. The statute requires the total quantity of almonds salable during this period to be allotted "equitably" among the handlers. To do so, the Secretary has to take into account almonds shipped between the beginning of the crop year and the issuance of the final reserve rule. Thus, the reserve obligation rules, even if retroactive, are authorized by the Act.

(b) Arbitrariness.

We may set aside an agency's decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Citizens for Clean Air v. E.P.A., 959 F.2d 839, 844 (9th Cir. 1992) (quotation omitted). Appellants contend that the final 1988-89 reserve obligation rule was arbitrary and capricious because it was issued after undue delay. The Board recommended the 25 percent reserve obligation on July 20, 1988. The Secretary issued a proposed rule on September 16, 1988, but did not issue a final rule until January 25, 1989, over four months later, and seven months into the crop year. According to appellants, the most active times for almond sales are in late summer and early fall; consequently, appellants argue,

it was arbitrary and capricious for the Secretary to have waited until well after this time had passed to issue a final reserve obligation rule.

However, appellants have cited no cases, and we have found none, holding that an agency's delay in issuing a rule makes the rule itself arbitrary or capricious. Therefore, although the delay was certainly unfortunate and should be avoided in the future, it was not arbitrary or capricious.[14]

Appellants also contend that the 1988-89 and 1990-91 reserve obligation rules were arbitrary and capricious because they did not include a sufficient statement of basis and purpose as required by 5 U.S.C. Sec. 553(c). We disagree. In the 1988-89 rule, USDA set out its calculations of supply and demand for California almonds and explained why a 25 percent reserve obligation was necessary:

> While this rule may restrict the amount of almonds which handlers may sell in normal domestic and expert markets, the salable and reserve percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. The

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14. The cases cited by appellants address the adequacy of agency explanations of the contents of their rules, not the delays in promulgating them. See, e.g., North Germany Area Council v. Federal Labor Relations Auth., 805 F.2d 1044 (D.C.Cir.1986); Celcom Communications Corp. v. F.C.C., 789 F.2d 67 (D.C.Cir.1986).

> reserve percentage is designed to reduce the oversupply situation in the industry in the 1988-89 crop year by holding off the market a percentage of the available almonds that could be added to an already fully supplied market. If the reserve were zero and all available California almonds were salable, almond prices, in a market which already has record supplies on hand, would be expected to drop in both domestic and foreign markets. Thus, the Board's recommendation for a 25 percent reserve is designed to effectuate the purposes of the Act by avoiding unreasonable fluctuations in supplies and prices.

54 Fed.Reg. 3584 (1989). A similar statement was included for the 1990-91 reserve obligation rules. See 55 Fed.Reg. 38,793, 38,794 (1990). Both statements explain the rules' basis (almond supply and demand estimates) and purpose (avoiding unreasonable fluctuations in supplies and prices).

Furthermore, USDA addressed the primary comments on the proposed reserve obligations that were made during the 15-day notice and comment period, such as objections to the crop size estimates, demand estimates, and reserve obligation size. See 54 Fed.Reg. 3584, 3585-87 (1989); 55 Fed.Reg. 38,793, 38,794-97 (1990).[15] The rules thus satisfied the requirement that

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15. The following example is illustrative:

> Many commenters who opposed the 35 percent reserve indicated that there is an over production of California almonds and that holding almonds in

(Cont'd)

they "indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did." Independent United States Tanker Owners Comm. v. Dole, 809 F.2d 847, 852 (D.C.Cir.), cert. denied, 484 U.S. 819, 108 S.Ct. 76, 98 L.Ed.2d 39 (1987).

Finally, appellants claim that the reserve obligation rules were arbitrary and capricious because USDA did not follow the dictates of Departmental Regulation (DR) 1512-1 in promulgating them. We have no authority to review appellants' challenge, because section 1 of DR 1512-1 states that "[t]his directive . . . is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person." See Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir.1986) (this language evinces "clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review").

(Cont'd)

> reserve this year will add to the surplus in following years. Over the past decade, however, annual marketable production has failed to meet trade demand needs for the 1983-84, 1985-86, 1986-87, and 1989-90 crop years. Given the wide swings in production from year to year which characterize the almond industry, it is possible that the 1991 crop could fall short of 1991-92 trade demand needs. If early projections of the 1991 crop indicate that this would likely be the case, an appropriate quantity of 1990-91 crop year reserve almonds would be released to the salable category to augment 1991-92 crop year supplies.

55 Fed.Reg. 38,793, 38,794 (1990).

Appendix F

2. 1990-91 agency agreements for reserve almond disposition.

A handler has two alternatives for disposing of reserve almonds. First, the handler may turn them over to the Board, which has the "power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable." 7 C.F.R. Sec. 981.66(a) (1993). The Board then distributes the proceeds from such disposition to the handlers on a pro rata basis. 7 C.F.R. Sec. 981.66(g) (1993). Alternatively, the handler may obtain authorization from the Board to act as the Board's agent in disposing of the reserve; all agents so authorized must sign agency agreements with the Board which contain "such reasonable terms and conditions, including inspection and certification requirements, as the Board may specify". 7 C.F.R. Sec. 981.67 (1993).

The agency agreements for the crop year 1990-91 contained a provision stating: "If established by the Secretary, minimum prices will apply to reserve almonds diverted to eligible outlets . . . Agents will be notified of any such minimum price schedule established." Appellants contend that because the agency agreements include this provision, they violate both the Act and the APA.

(a) Agency agreements and the Act.

Appellants claim that the minimum price provision violates the Act because the Act forbids the fixing of prices with respect to almonds. This is incorrect; the Act is silent regarding whether agricultural marketing orders may set the prices that handlers receive from their customers.[16] The Act does state that almond

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16. Appellants quote our observation in Pescosolido v. Block, 765 F.2d 827 (9th Cir. 1985), that "the Secretary is not empowered to fix prices for any (Cont'd)

marketing orders may provide for the establishment of reserve pools of almonds and provide "for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein." 7 U.S.C. Sec. 608c(6)(E) (1988). The Almond Marketing Order further provides that "[t]he Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable." 7 C.F.R. 981.66(a) (1993) (emphasis added). Because including minimum price provisions in agency agreements is consistent with this mandate, we hold that the agreements do not violate the Act.

(b) Agency agreements and the APA.

Appellants contend that the minimum price provision was an "additional regulation" requiring the Secretary to follow the APA's notice-and-comment procedure before adopting the agency agreements.[17] Appellants cite American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C.Cir.1987), in support of their argument. In American Hosp. Ass'n, the D.C. Circuit addressed the issue of whether the Department of Health and Human Services (HHS) had to subject certain of its contracts to APA notice and comment. As part of the Medicare program, HHS was

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(Cont'd)

[commodities other than milk] covered by the Act." Id. at 830. Pescosolido is inapplicable to the present case because it dealt with the prices that handlers pay to producers, not the prices that handlers receive from their customers.

17. Agency agreements are contracts, and the APA does not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefit, or contracts." 5 U.S.C. Sec. 553(a)(2) (1988) (emphasis added). In 1971, however, USDA promulgated a regulation making the APA's procedural requirements applicable to all of its rule making relating to contracts. 36 Fed.Reg. 13,804 (1971).

required to contract with "peer review organizations" (PROs), private organizations of doctors that would monitor the professional activities of Medicare service providers in their areas. Id. at 1041. Congress granted HHS great discretion to contract with each PRO as it saw fit, in order to tailor the service review process to local needs. Id. at 1053. The statute provided specifically that

> Contracting authority of the Secretary under this section may be carried out without regard to any provision of law relating to the making, performance, amendment or modification of contracts of the United States as the Secretary may determine to be inconsistent with the purposes of this part.

Id. (quoting 42 U.S.C. Sec. 1320c-2(e)). The D.C. Circuit held that this statutory language exempted HHS only from "the vast corpus of laws establishing rules regarding the procurement of contracts from the government," and did not exempt HHS from the "general restraints" of the APA. Id. at 1054. More specifically, the language did not "restor[e] a broad exemption from all APA requirements that would allow HHS on its own to modify vitally important provisions of peer review." Id. The court found that since Congress had granted HHS very broad discretion to implement the peer review program through individualized contracts with PROs, the danger of HHS' "legislating" the program through contractual terms was too high unless those terms were subject to APA notice and comment. Id. The court concluded that "any contract provisions that are legislative are subject to Sec. 553's notice and comment requirements." Id. (emphasis added).

Appendix F

We find the agency agreements to be distinguishable from the PRO agreements at issue in American Hosp. Ass'n. There, the central mechanism for implementing the entire peer review program was the PRO contracts, because Congress had mandated that HHS enter into such a contract with a PRO in each area. Thus, there was a real danger that HHS would assume the role of unelected legislative body and promulgate statutory law under the guise of PRO contract terms. Here, by contrast, the agency agreements are incidental to the administration of the Order; they simply give handlers another, perhaps preferable, option for disposing of their reserve almonds. Unlike the program at issue in American Hosp. Ass'n, USDA is not required to enter into agreements with handlers, nor is any individual handler required to enter into an agreement with USDA. Because the agreements are incidental to the entire program, and because handlers have another option, there is little danger that USDA will legislate through agency agreements.

Furthermore, even if the agency agreements did raise the dangers identified in American Hosp. Ass'n, the only provision that appellants specifically object to—the minimum price provision—is not "legislative" and thus would not be subject to APA procedures. The Act grants the Secretary the power to "provid[e] for the equitable distribution of the net return derived from the sale [of the reserve pool] among the persons beneficially interested therein." 7 U.S.C. Sec. 608c(6)(E) (1988). We held above that a minimum price provision is a legitimate means of enforcing this requirement; the provision is thus a "procedural" rule exempt from the APA's requirements. See American Hosp. Ass'n, 834 F.2d at 1055 ("procedural" rules, those that are "legitimate means of structuring [the agency's] enforcement authority," are exempt from the APA notice and comment requirement).

3. Restrictions on handlers' disposition of reserve almonds.

(a) Reserve almond storage requirements.

During the 1988-89 crop year, the Board informed handlers that their reserve almonds had to be stored in California. The Board instituted this requirement without following the procedural rule making requirements of the APA. Appellants argue that the California storage rule is a substantive rule that could have been promulgated only through compliance with the APA.

The Order grants the Board the power to "receive, investigate and report to the Secretary complaints of violations of [the Order]." 7 C.F.R. Sec. 981.38 (1993). To aid the Board in exercising this power, the Order also provides that "[e]ach handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of [certain] records and for inspection and observation of almonds." 7 C.F.R. Sec. 981.70 (1993). The California storage rule helped ensure such accessibility and was thus a "legitimate means of structuring [the agency's] enforcement authority." American Hosp. Ass'n, 834 F.2d at 1055. We hold that the California storage requirement, like the minimum price provision, was a "procedural" rule exempt from the APA notice-and-comment requirement. [18]

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18. While storing almonds in California may have inconvenienced appellants, the mere fact that a rule may have a substantial impact "does not automatically transform it into a legislative rule." State ex rel. State Water Resources Control Bd. v. Federal Energy Regulatory Comm'n, 966 F.2d 1541, 1554 (9th Cir. 1992) (quotation omitted).

(b) Future sales contracts for reserve almonds.

The Order prohibits the "handling" of reserve almonds. 7 C.F.R. Sec. 981.50 (1993). The Order defines "to handle" as "to sell" or "to put into channels of trade." 7 C.F.R. Sec. 981.16 (1993). In December 1988 USDA sent out a letter stating that it considered a contract for the disposition of reserve almonds entered into before the release of the reserve to be a "sale" and thus a prohibited act of "handling." Effectively, then, USDA prohibited handlers from entering into contracts to sell reserve almonds.

Appellants contend that this letter was a rule that should have been promulgated pursuant to the notice and comment requirements of the APA. However, "interpretive" rules—"those which merely clarify or explain existing law or regulations"—are exempt from these requirements. Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986) (quotation omitted); 5 U.S.C. Sec. 553(b)(A) (1988). USDA's prohibition on the pre-release sale of reserve almonds is just such a rule, because it interprets the Order's prohibition on the handling of reserve almonds. The rule is therefore exempt from APA notice and comment.

4. Assessments on reserve almonds.

USDA currently imposes assessments on the total quantity of almonds received by handlers, including those in the reserve. Appellants contend that both the Act and the Order prohibit USDA from doing so.

We disagree. The Act states that each handler shall be assessed pro rata for reasonable Board expenses

> other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order.

7 U.S.C. Sec. 610(b)(2)(ii) (1988) (emphasis added). Appellants argue that the Board does not dispose of the reserve almonds "for the benefit of" the handlers and that therefore the Board cannot impose assessments on those almonds to cover the expenses of doing so. However, the proceeds from the Board's disposition of a handler's almonds are turned over to the handler. 7 U.S.C. Sec. 608c(6)(E) (1988); 7 C.F.R. Sec. 981.66(g) (1993). The reserve almonds are therefore disposed of "for the benefit" of the handlers, and the Board may consequently impose assessments on them.

We also reject appellants' contention that the Order prohibits the imposition of assessments on reserve almonds. The Order states that a handler shall only be assessed on almonds "received by him for his own account." 7 C.F.R. Sec. 981.81(a) (1993). All reserve almonds are originally "received" by handlers for their own account, and thus subject to assessment. Only after being received by handlers are a certain percentage of almonds then "held" for the account of the Board. Even then, they are not really held for the account of the Board in the sense of the Board's receiving the proceeds from the disposition thereof, because the handlers get those proceeds. This terminology and regulatory structure is admittedly somewhat ambiguous, but "where Congressional intent is ambiguous, courts should defer to a reasonable agency interpretation of a statutory scheme the agency is entrusted to administer." Railway

Labor Executives' Ass'n v. I.C.C., 958 F.2d 252, 256 (9th Cir.1991). We defer to USDA's reasonable interpretation of the Order.

IV. THE ADMINISTRATIVE REMEDY PROCEDURE

Appellants finally contend that the long and tortuous path they have had to follow to exhaust their claims violates their right to due process. While we understand appellants' frustration with the administrative remedy procedure, we must also reject their argument. Appellants claim that the procedure does not provide petitioners with a "clear and certain remedy;" however, we have already held that a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due. Saulsbury Orchards, 917 F.2d at 1195 (quoting Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 452 (9th Cir.1983)). [19] As for the amount of time appellants have spent pressing their claims, we agree with the district court's reasoning that

> [w]hile there is no question that completion of the administrative process in connection with this Section 15(A) petition was very

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19. Contrary to appellants' contention, the Supreme Court's holding in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), does not require the remedy to consist of compensatory damages. The Court held only that an appropriate remedy for taxes unlawfully collected from plaintiff could either be a refund of taxes unlawfully collected or an assessment and collection of back taxes from the plaintiff's competitors. Id. at 40, 110 S.Ct. at 2252. McKesson never held that compensatory damages were required; it held only that a refund of unlawful taxes was one possible way for the State to satisfy the requirements of the Due Process Clause.

> lengthy, it is also apparent that some of the delay resulted from the sheer number and magnitude of the issues raised in the petition as well as from the litigation tactics adopted by plaintiffs... [T]he court thinks it unrealistic of plaintiffs to expect prompt resolution of the quality and quantity of issues raised herein.

The length of the proceedings, although certainly regrettable, was not a denial of due process.

V. CONCLUSION

We affirm the judgments for USDA on all issues except the almond marketing program, which we find to violate the First Amendment. We are now faced with the question of what remedy to grant to appellants. Appellants request a full refund of the assessments imposed upon them from 1980 to the present, as well as attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. Sec. 2412. Because of the fact-intensive nature of the inquiry, we find that "[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court." Chicago Teachers Union v. Hudson, 475 U.S. 292, 310, 106 S.Ct. 1066, 1078, 89 L.Ed.2d 232 (1986). See also Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). The case is remanded for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX G — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED DECEMBER 11, 1991

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

91 AMA Docket No. F&V 981-8

(*Cal-Almond II*)

In re:

Cal-Almond, Inc., a California corporation and Gold Hills Nut Co., Inc., a California corporation,

Petitioners

Decision and Order

This is a proceeding instituted by a Petition filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Order Regulating the Handling of Almonds Grown in California (7 C.F.R. Part 981).[1]

On April 4, 1991, Chief Administrative Law Judge Victor W. Palmer (ALJ) filed an Initial Decision and Order dismissing all paragraphs of the Petition which were not withdrawn by Petitioners.

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1. *See generally* Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, §§ 2.01-.15, 2.46-.58 (1981 and 1989 Cum. Supp.).

Appendix G

On May 1, 1991, Petitioners appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On June 17, 1991, the case was referred to the Judicial Officer for decision.

Pursuant to the Rules of Practice (7 C.F.R. § 900.66), I am adopting the ALJ's Initial Decision as the final Decision and Order in this proceeding.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

Petitioners instituted this proceeding pursuant to 7 U.S.C. § 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937 ("AMAA") by filing a petition on October 5, 1990, which alleges that various aspects of the Marketing Order regulating the handling of Almonds Grown in California ("Order") (7 C.F.R. Part 981) are invalid and not in accordance with law. Respondent filed an answer on November 15, 1990.

On February 27, 1991, I held a telephone conference with Brian C. Leighton, attorney for Petitioners, and Frank Martin,

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2. The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Jr., attorney for Respondent. We discussed the application of the current petition to the initial decision I issued March 19, 1990, with respect to the same petitioners in 89 AMA Docket Nos. F&V 981-5 and 981-6 (*Cal-Almond I*). Subsequent to our telephone conference, the Judicial Officer, on March 8, 1991, issued a final decision in *Cal-Almond I.* We also discussed the application of the current petition to the decision issued by the Judicial Officer on January 23, 1991, in AMA Docket No. F&V 981-4 (*Saulsbury*).

The parties agreed that most of the issues in the current petition had been previously joined and decided in either *Cal-Almond I* or *Saulsbury.* To expedite resolution of the major issues in this proceeding and to speed ultimate court review, Petitioners' attorney agreed to withdraw without prejudice any issue that had not been previously decided by the Judicial Officer.

On March 22, 1991, the parties submitted a proposed certification of issues for my review and the rulemaking record for the 1990-91 crop year, which has been made a part of the record of this proceeding. The parties listed the issues withdrawn by Petitioners and those proposed for certification. It is to be noted paragraph 13 of the current petition which asserts that the 15(A) administrative process violates due process because it affords Petitioners neither monetary damages, a hearing, nor interim relief in advance of the imposition of reserve requirements, has only been inferentially addressed by the Judicial Officer. Upon further review of the petition, answer, and the proposed certification of issues, I concluded that the issues listed for certification could be dismissed either on the basis of controlling decisions by the Judicial Officer or because the issues do not state a claim upon which relief may be granted.

Appendix G

On March 27, 1991, I conducted another telephone conference with the attorneys for the parties and advised them of my conclusions. Petitioners' attorney agreed that under past decisions by the Judicial Officer, the petition could be dismissed, but he expressed concern that he would then have to engage in extensive briefing under the Department's appeal process. He therefore preferred certification of the issues to avoid briefing again those issues which were fully briefed in the earlier cases and would attenuate the time in which the Department's final decisions will be issued. I advised him that I would point out his concerns as part of this order and recommend to the Judicial Officer that he base his final decision upon the briefs filed in the earlier cases, as hereinafter cited, and not require the parties to brief these issues anew. Counsel for Respondent joined in petitioner's request and my recommendation.

Conclusions

1. Petitioners designated by paragraph numbers and letters the issues withdrawn without prejudice as listed in the petition. They are as follows: Paragraphs 10(d), (e), and (f); and 11(i), (j), (l) and (m). They are hereby withdrawn.

2. The remaining issues are dismissed with prejudice for the reasons hereinafter setforth.

Discussion

Petitioners allege in paragraphs 9(a) and (b) and 10(a) that the 1990-91 proposed and final reserve rules violate the Administrative Procedure Act ("APA") because the Secretary failed to comply with Departmental Regulation 1512-1 and Exec. Order No. 12,291, 3 C.F.R. 127 (1981 Comp.), *reprinted*

in 5 U.S.C. § 601 at 473 (1988) respecting the issuance of "major" rules. Departmental Regulation 1512-1 and Executive Order 12,291 do not create a private right of action, and were not intended to have the force and effect of law. *Cal-Almond I,* slip op. at 22-25. *See State of Michigan v. Thomas,* 805 F.2d 176, 187 (6th Cir. 1986) (agency compliance with Executive Order 12,291 not subject to judicial review); *cf. Brennan v. Ace Hardware Co.,* 495 F.2d 368, 376 (8th Cir. 1974) (internal handbook for agency personnel does not itself create requirements binding upon the agency). Thus, the Department's compliance is not reviewable in this proceeding and those allegations are dismissed.

Petitioners allege in paragraph 9(c) that the reserve rule violates the APA because a fifteen day comment period was not a reasonable time period. The Judicial Officer addressed this issue in *Cal-Almond I* where he found that a fifteen day comment period was reasonable.

> Although the Administrative Procedure Act requires that a final rule must ordinarily be published 30 days before its effective date (5 U.S.C. § 553(d)), the statute does not specify how much time must be given for filing comments after the publication of a proposed rule. The Attorney General has interpreted the Administrative Procedure Act only to require "reasonable notice," U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 28-29 (1947).

Cal-Almond I, slip op. at 22. Agencies may determine their own

rules of procedure and methods of inquiry as long as they are not arbitrary, capricious or an abuse of discretion. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 543 (1978); *F.C.C. v. Schreiber,* 381 U.S. 279, 290 (1965); *Phillips Petroleum Co. v. E.P.A.,* 803 F.2d 545, 559 (10th Cir. 1986); *Cal-Almond,* slip op. at 22. Petitioners failed to explain why 15 days was not a reasonable comment period. Moreover, *Cal-Almond I,* slip op. at 23, held 15 days to be a reasonable comment period when the stated goal is to expedite the rule's promulgation. That reasoning has application here and the allegations are therefore dismissed.

Petitioners allege in paragraph 10(b) that the Secretary erroneously concluded that the final rule would not have a significant economic impact on a substantial number of small entities and in paragraph 10(c) that the Secretary did not have a substantial basis and purpose for the reserve. The applicable standard of review for deciding these questions is the arbitrary and capricious standard set forth at 5 U.S.C. § 706(2)(A) of the APA. Under it, Petitioners must prove that the decision of the Secretary was not supported by the record, not merely that another alternative existed. In controlling cases applying this standard to proceedings pursuant to 7 U.S.C. § 608c(15)(A), the challenged agency action is presumed to be valid and the judgment of the reviewing judge may not be substituted for that of the agency. *Saulsbury,* slip op. at 36-38; *In re Sequoia Orange Co.,* 47 Agric. Dec. 2, 86-91 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter,* No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *appeal docketed,* No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990).

The Judicial Officer has specifically held that the establishment of a reserve program for the almond industry is

generally valid. *Saulsbury,* slip op at 59-65; *Cal-Almond I,* slip op. at 21-30. Petitioners fail to explain why the Secretary's conclusion to impose the reserve for 1990-91 was erroneous. The Secretary provided notice and comment rulemaking in accordance with the APA, and addressed the comments received. 55 Fed. Reg. 32637, 38793 (1990). In fact, the Secretary specifically responded to comments that the reserve would work a financial hardship on some entities:

> Many growers indicated that a 35 percent reserve would cause them financial hardship. Several of these commenters indicated that the proceeds they receive from the salable portion of their crops would not be sufficient to cover cultural costs or payments on bank loans. Many growers indicated that they did not believe that withholding 35 percent of the crop in reserve would give them 35 percent more income from the salable portion of the crop.
>
> These commenters appear to equate the reserve to losing 35 percent of their crop. In actual practice, the 35 percent reserve is not lost to the market. For example, a portion of the reserve may be released to the salable category later in the season, once a portion of the crop has been marketed and the danger of an oversupplied market early in the season, with consequent price reductions, has passed. Of those almonds sold by handlers in reserve outlets, many are expected to be sold by handlers in noncompetitive markets

> which command prices which are only slightly below prices for salable almonds. While some reserve almonds may be sold in low-value outlets, the improved prices received for the salable portion of the crop and the improved stability of the industry are expected to more than compensate for any price reduction.

55 Fed. Reg. 38793, 38795 (1990). Without some semblance of a showing that the decision of the Secretary to impose the reserve for 1990-91 was arbitrary, capricious or an abuse of discretion, the Secretary's decision must be presumed valid. Therefore, this challenge to the legality of the reserve for the 1990-91 marketing year is dismissed.

Petitioners argue in paragraph 10(g) that the reserve rule was invalid because it was applied retroactively in violation of the APA as interpreted by the Supreme Court in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). After his review of the *Bowen* decision, the judicial Officer held that the AMAA and the Almond Marketing Order authorize retroactive rulemaking. *Cal-Almond I*, slip op. at 40-43; *Saulsbury*, slip op. at 152-167; *In re Wileman Bros. and Elliot, Inc.*, AMA Docket Nos. F&V 916-1, 917-3, 916-2 and 917-2 (slip op. July 9, 1990 at 83-84), *appeal docketed*, No. CV F 90-473-EDP (E.D. Cal. July 27, 1990). Therefore, these allegations are necessarily dismissed.

In paragraphs 11(a), (b) and (c), Petitioners claim that the reserve constitutes a taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution U.S. Const. amend V. Petitioners also argue

that the reserve rule violates their rights to due process under the United States Constitution because they were denied a hearing prior to the taking. U.S. Const. amend. V. However, these precise arguments have been previously rejected. It has been held that an almond reserve pursuant to the AMAA does not constitute a taking without just compensation. *Cal-Almond I,* slip op. at 25-30. *Accord, Prune Bargaining Ass'n v. Butz,* 444 F. Supp. 785 (N.D. Cal. 1975) (marketing order provisions restricting the sale of reserves does not constitute a taking without just compensation); *United States v. Rock Royal Co-op., Inc.,* 307 U.S. 538, 568-81 (1939) (volume control pursuant to the AMAA of an agricultural commodity moving in interstate commerce does not constitute a taking without just compensation). Accordingly, these allegations of the petition are dismissed.

Paragraphs 11(d), (e) and (f) allege that the failure to follow APA notice and comment procedures prior to the use of an "agency agreement" by the Almond Board to control handler disposition of almonds held in reserve, is unconstitutional under the Fourth Amendment's Taking Clause and its Unreasonable Search and Seizure Clause, as well as under the Fifth Amendment's Due Process Clause. As before, Petitioners' Taking Clause arguments must be dismissed under the analysis set forth in *Cal-Almond I,* slip op. at 25-30, *supra.* Arguments that the use of the agency agreement constitutes an unreasonable search and seizure, are likewise concluded to be inapposite. As explained in *Saulsbury,* slip op. at 113, the marketing order is construed to give the Board complete power and authority to dispose of all reserve almonds. 7 C.F.R. § 981.66 (1990). This accepted "plenary authority" (*Saulsbury,* slip op. at 115) over reserve almonds, necessarily includes the Board's right to relax its authority by using the Agency Agreement to allow handlers to dispose of some of the almonds they are required to hold in

reserve. Since restrictions are being lessened, there is no need for rulemaking and it is inappropriate to characterize the use of the Agency Agreement to lessen the rulemaking restriction as a form of unreasonable search and seizure. Therefore, these allegations of the petition are dismissed.

Paragraphs 11(g) and (k) challenge the imposition of minimum prices for almonds subject to the 1990-91 reserve and the lawfulness of the entire reserve because petitioners contend such action is not authorized by the marketing order or the AMAA. However, 7 U.S.C. § 608c(6)(E) authorizes marketing orders for agricultural commodities or products including almonds to contain provisions:

> (E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and *providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.* (emphasis added)

If industry members could sell almonds at less than the prices set for the reserve, price cutting could destroy the efficacy of the reserve and work against equitable distribution of the net return to all persons beneficially interested.

This provision of the AMAA, together with its authorization at 7 U.S.C. § 68c(7)(D) of incidental provisions necessary to effectuate the other provisions of a marketing order, support the use of minimum prices in agency agreements respecting the disposition of reserve almonds. When the Judicial Officer

concluded in *Saulsbury* that the Almond Board's minimum prices and assessments need not be published through the rulemaking process, he analyzed the Marketing Order's provisions requiring handlers to comply with reserve obligations and concluded that "the Order gives the Board complete power and authority to dispose *all* reserve almonds." *Saulsbury*, slip op. at 113. Complete power necessarily includes the setting of minimum prices over those a handler may sell, and his conclusion was necessarily premised upon the Marketing Order's authorization of such power. Accordingly, these paragraphs of the petition are dismissed.

In paragraph 11(h), petitioners assert that the reserve rule violates their right to due process under the United States Constitution because regulations imposing criminal and civil penalties cannot be applied retroactively. As explained above, the rule authorizing the reserve has been held not to be retroactive. Therefore, this allegation must be dismissed.

Petitioners argue in paragraphs 12(a), (f), (g) and (k) that the Secretary failed to comply with the APA when issuing the final rule imposing assessments for the 1990-91 crop year. Petitioners state that there was no substantial basis and purpose for the rule and that it is arbitrary, capricious and an abuse of discretion. In *Saulsbury*, the Judicial Officer held that the Secretary does not need to engage in rulemaking to establish rates of assessment. "[T]here is nothing in the Agricultural Marketing Agreement Act of 1937 that requires that a handler's assessment obligations be set forth in a regulation." *Saulsbury*, slip op at 166. Thus, these allegations must be dismissed.

Petitioners argue in paragraphs 12(b) and (c) that the imposition of assessments for marketing years 1990-91 were

retroactive and therefore invalid and a violation of due process. However, those precise contentions were dismissed in *Saulsbury*, slip op. at 162-67. That decision went on to hold that the Secretary is not even required to promulgate an annual regulation to impose assessments. Under the holdings in *Saulsbury* therefore, these paragraphs must be dismissed.

Petitioners claim in paragraphs 12(d) and (e) that the assessment obligation is a violation of the AMAA, the Order and the Due Process Clause of the United States Constitution. Section 608c(I) of the AMAA authorizes assessments. The Order is promulgated pursuant to the AMAA. *Saulsbury*, slip op. at 80-82, 152-67. Petitioners fail to state why the assessment obligation is a violation of due process and a bare assertion is legally insufficient.

In paragraph 12(h), Petitioners assert that the advertising assessment obligation violates their rights guaranteed under the First Amendment of the United States Constitution. U.S. Const. amend I. The Judicial Officer held in *Saulsbury* that the assessment obligation does not violate almond handlers' rights to free speech. *Saulsbury*, slip op. at 82-88; *See United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied* __ U.S. __, 110 S. Ct. 1168 (1990) (advertising program, with assessment obligation, did not violate the First Amendment rights of the cattle producers).

In paragraphs 12(i) and (j), Petitioners argue that the advertising program of the almond industry is violative of section 608c(10) of the AMAA. Section 608c(10) states that marketing orders may not prohibit, regulate or restrict the advertising of any commodity. In *Saulsbury*, the Judicial Officer held that the Order regulates a handler's ability to receive credit

and does not regulate the advertising of a handler. *Saulsbury,* slip op. at 126. Therefore, the almond advertising program does not violate section 608c(10) of the AMAA.

Finally, in paragraph 13, Petitioners argue that the failure of the Judicial Officer to provide interim relief is a violation of the Due Process Clause of the United States Constitution. A request for interim relief must be addressed to the Judicial Officer and his decision of January 10, 1991, denying interim relief is, of course, not reviewable by an administrative law judge.

Order

For the aforementioned reasons, the specified paragraphs of the petition which were not withdrawn by petitioners, are dismissed with prejudice.

Done at Washington, D.C.

December 11, 1991

s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

APPENDIX H — EXCERPTED DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED MARCH 8, 1991

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

89 AMA Docket No. F&V 981-5

In re:

Cal-Almond, Inc., and Gourmet Packing Co., Inc.,

Petitioners

89 AMA Docket No. F&V 981-6

In re:

Gold Hills Nut Co., Inc.,

Petitioner

Decision and Order

This is a proceeding instituted by petitions filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Order Regulating the Handling of Almonds Grown in California (7 C.F.R. Part 981).*

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* *See generally* Vetne, *Federal Marketing Order Programs*, in 1 Davidson Agricultural Law. §§ 2.01-.15, 2.46-.58 (1981 and 1989 Cum. Supp.).

Appendix H

On March 19, 1990, Chief Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order holding against petitioners on all issues except two. As to the issues decided in petitioners' favor, the ALJ held that the 1988-89 rules requiring petitioners to hold almonds in reserve and to pay administrative assessments were invalid retroactive rules.

In sum, upon consideration of the character of the 1988-89 reserve rule, its economic impact and, specifically, the extent to which it interfered with Petitioners' reasonable investment-backed expectations, I conclude that it is not the type of governmental action that is proscribed by the just compensation clause as an unconstitutional interference with property interests.

B. ***The interpretations by the Almond Board and AMS respecting the actions handlers needed to take to comply with the reserve requirements were valid under the Act and Marketing Order 981.***

In a letter to the Board, dated December 14, 1988, AMS stated its position that a contract for the disposition of reserve almonds entered into before the release of the reserve constitutes a sale or consignment and is therefore an act of handling within the meaning of the relevant provisions of the Order. The agency further stated that it considered such transactions to be price-depressing and detrimental to the reserve program. Petitioners maintain that they refrained from entering into contracts for the sale of reserves in deference to the agency's view. Petitioners argue that neither the AMS position, nor the consequent obligation imposed on them to eschew this type of transaction, was in accordance with law.

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Petitioners' arguments are unpersuasive. It is well established that an agency's interpretation of its own regulations is entitled to great weight. *County Line Cheese Co. and Meadow Gold Dairy*, 44 Agric. Dec. 63, 87 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987).

Deference to agency expertise is especially appropriate when the regulations in question are components of intricate, highly technical regulatory programs, such as marketing orders. *See, e.g., Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966); *Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 59-60 (1986) (citing numerous cases in support). Agency interpretations of regulations implementing this type of program are to be upheld on review if they are reasonable. *County Line Cheese Co.*, 41 Agric. Dec. 640, 643-644 (1982). The AMS position on contracts for the future sale of reserve almonds meets this standard.

The formation of a contract for the future sale of almonds is reasonably viewed as placing those almonds into the channels of trade. The term "sale" can reasonably be read as including future sale. Moreover, commitments for future sales of storable agricultural commodities, such as almonds, are known to have substantial intertemporal effects on prices. *See, e.g.*, Peck, *Futures Markets and Intertemporal Commodity Pricing*, in ECONOMIC EFFICIENCY IN AGRICULTURAL AND FOOD MARKETING 256 (R. Kilmer and W. Armbruster eds. 1987). The existence of these economic effects strongly supports the conclusion that contracts for future sales place reserve almonds into the channels of trade.

Agency action is "presumed to be based on facts justifying the specific exercise of . . . delegated authority." *Sequoia Orange Co., et al.*, [*supra*,] 47 Agric. Dec. [at] 87, *citing United*

States v. Rock Royal Co-op, Inc., 307 U.S. at 567-568. Petitioners have not presented any evidence sufficient to overcome this presumption favoring the Agency's position on contracts for future sales of reserve almonds. Therefore, the Department's position should stand.

Petitioners also challenge the Board's position that reserve almonds must be stored within the State of California. Petitioners maintain that the Board lacks the authority to impose this requirement.

Petitioners' argument is belied by the language of the Order and the realities of administration. Section 981.38 grants the Board the power to investigate violations of the Order and to administer the Order according to its terms. Section 981.70 of the Order provides that each handler's premises shall be accessible to the Board for the examination of almonds. Given the authority granted by these sections, it is proper for the Board to impose ancillary requirements which reasonably control the geographic scope of its oversight activities.

Petitioners have stated that the Board's requirement frustrated their plans to store reserve almonds in West Germany. The monitoring of almonds stored in a distant foreign country would constitute an unjustifiable burden on the Board. Furthermore, the shipment of reserve almonds to West Germany, even if done, as Petitioners urge, to save delivery time in the even that the reserve is released, may reasonably be viewed as an act of selling or consigning. At the very least, such conduct strongly suggests the presence of an underlying sale or consignment contingent upon the release of the reserve. And, as discussed above, entry into arrangements of this type constitutes an act of handling. It would be unreasonable to assume that Petitioners

would incur the expenses of leasing warehousing facilities in West Germany, shipping almonds there, and maintaining them in good condition, if those almonds were not, in fact, committed for sale. In sum, given Petitioners' intention to store reserve almonds in West Germany, I conclude that the Board acted reasonably and within the boundaries of its authority in requiring that reserve almonds be stored within the State of California.

C. *The Secretary's rulemaking action setting handler assessments for the 1988-89 crop year was . . . [valid].*

Petitioners maintain that the 1988-89 assessment rule is not in accordance with law because (1) it is retroactive, (2) the 10-day comment period used was violative of Departmental Regulation 1512-1 and the Administrative Procedure Act, (3) it became effective on the date of its publication in the *Federal Register* and was therefore violative of the Administrative Procedure Act requirement that its effective date be delayed for 30 days or more after publication, (4) assessments on reserve almonds are unauthorized under the Order, (5) creditable advertising assessments based in part upon reserve tonnage are arbitrary because they force handlers to advertise almonds which may not be sold, and (6) the Department failed to provide a proper statement of the purpose of the rule.

. . . .[3]

Petitioners also challenge the Department's decisions to use a 10-day comment period and to dispense with the requirement

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3. The ALJ's holding, that the Secretary's action was not in accordance with law since it was retroactive, is omitted.

of 5 U.S.C. § 553(d) that a rule take effect no sooner than 30 days after its publication in the *Federal Register*. . . .

However, considered in isolation from the retroactive character of the assessment rule, the Department's choice of comment procedure and effective date is amply supported by the stated rationale. The Department's objective of expediting the . . .

* * *

Order

The relief requested by petitioners is denied and the petitions are dismissed.

Done at Washington, D.C.

March 8, 1991

s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

APPENDIX I — EXCERPTS OF DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED JANUARY 23, 1991

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. F&V 981-4

In re:

Saulsbury Orchards and Almond Processing, Inc., a California Corporation; Cal-Almond, Inc., a California Corporation; Carlson Farms, a sole proprietorship,

Petitioners

Decision and Order

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* * *

> to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. . . .

7 U.S.C. § 608d(1) (1988). This provision does not state that the secretary shall prevent an abuse of antitrust laws; rather, it provides for the release of information to the Secretary for a determination to see if an abuse has occurred. Petitioners do not explain how this section of the AMAA is relevant.

Appendix 1

III. The Market Development Program [and Reserve Obligations].

The Almond Butter Market Development Program ("Program") was instituted in 1982. The purpose of the Program [and the 1982-crop reserve obligations were] explained by the Secretary in the final rule [establishing the 1982-crop saleable and reserve percentages] (RX 4):

> [The remaining two percent (6.8 million pounds) of the 1982 marketable production must be withheld by handlers to meet their reserve obligations.) These almonds [reserve almonds] will be available to develop outlets noncompetitive with normal domestic and export outlets. The development of such outlets is a long-term necessity for the industry because of anticipated larger crops. The Board plans to use the reserve to develop a market for almond butter and has presented an industry-wide project. The Board's objective is to develop a permanent consumer demand for almond butter and related products that, in time, will absorb a large quantity of almonds. To insure success with this project, the Board believes that initially it is necessary to keep almond butter competitive with peanut butter, which currently dominates the market. In addition, the Board plans to promote the use of almonds in school lunch programs with the objective of encouraging school authorities to buy almonds for those programs on a

> regular basis. Reserve almonds could also be disposed of in other eligible noncompetitive outlets authorized by the order.

There was considerable energy expended by the parties over whether to refer to the Program as the "Almond Butter Program" or the "Market Development Program." However, what is important is not the name, but the substance of the Program.

Petitioners have three arguments relating to the Program: (1) the Program lacked a rational basis in the rulemaking record; (2) the Secretary erred by failing to specify in the final rules the percentage of the reserve to be allocated to the Program for the crop years 1984-86; and (3) the Secretary should have allowed notice and comment on the determination of the minimum prices [required to be charged to buyers] and special assessments on almonds disposed of under the Program.

First, Petitioners argue that the Program lacked a rational basis in the rulemaking record. Petitioners contend that there was no justification to impose the reserve to develop a market for almond butter. There was no explanation in the 1982 final rule to indicate that almond butter could compete with peanut butter, that such a program would be successful, or that the industry actually needed a butter program in anticipation of larger crops.

Petitioners argue that a reserve cannot be imposed unless it is for supply management and that this reserve was not supply management. Petitioners rely on the report of the AMS field agent: "Obviously a 2% reserve is not supply management in any sense, but such establishment is necessary in order to give the industry an opportunity, on a uniform basis, to develop an almond butter market." (RX 7)

Appendix 1

Petitioners assert that the reserve imposed for the 1983-84 crop year, with respect to the Program, was even more arbitrary and capricious than it was for the previous year. For the 1982-83 crop year, there were 340 million pounds of marketable supply produced in California, with a trade demand of 360 million pounds. (RX 4) For the 1983-84 crop year, there were 230 million pounds of marketable supply, with a trade demand of 320 million pounds. (RX 16) Thus, for the 1983 crop year, there was a difference of 90 million pounds needed to supply the trade demand, while in 1982, there was only 20 million pounds needed. For the 1983 crop year, the Secretary imposed a three percent reserve (6.9 million pounds) which could only be used for sale into almond butter or non-competitive outlets such as cattle feed. (RX 16 [; 7 C.F.R. § 981.66(c)]) Petitioners contend that the reason the 1983-84 reserve was more arbitrary than the 1982-83 reserve was that in the 1983-84 final rule, the Secretary stated that most of the two percent reserve in 1982-83 went to inedible outlets rather than into almond butter. (PX 16)[7]

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7. Petitioners overlook the carryover statistics, which destroy their argument. The estimated supply to satisfy the estimated demand for a particular crop year consists of the carryover from the prior year (i.e., the almonds from the prior year's crop still on hand at the beginning of the crop year) plus the estimated production. Consideration must also be given to the amount desirable to be carried over at the end of that crop year for early season shipments during the following crop year (before the following year's crop is available for market). The following statistics are set forth in the Secretary's final rules for the 1982-83 crop and the 1983-84 crop (RX 4; PX 16):

	1982-83 Crop Million Pounds	1983-84 Crop Million Pounds
Carryover from Prior Year	161	178.9
Est. Production	340	230.0
Total Supply	501	408.9

(Cont'd)

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Petitioners contend that the reserve amounts for 1984-85 and 1985-86 crop years were not supported by substantial evidence in the rulemaking record. Petitioners argue that the secretary did not independently, from the Board's recommendation, perform any analytical and judgmental functions to determine if the recommended reserve was justified. Further, the Secretary's basis and purpose statement was not sufficiently detailed and informative to explain the reason for the reserve. 5 U.S.C. § 553(c) (1988).

Respondent argues that the Secretary had a substantial basis in the rulemaking record for the institution of the reserve for the crop years 1982-1986. The purpose of the Program was to develop a market which would reduce future surpluses, provide additional outlets for almonds, such as almond butter, and as a result, increase grower returns. (RX 6, p. 33) For each rule, the secretary reviewed transcripts of Board meetings, minutes, reports from the AMS field agent and various other documents, including resolutions, correspondence among industry members, and recommendations. Respondent explains that those documents were replete with support for a reserve to create

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(Cont'd)

Est. Demand	360	320
Est. Desirable Year-end Carryover	134.2	82
Demand + Year-end Carryover	494.2	402
Est. Surplus	6.8 (2%)	6.9 (3%)

Hence, considering the total estimated supply and demand situations, there was an estimated 2% surplus for the 1982-83 crop (6.8 + 340 = .02) and an estimated 3% surplus for the 1983-84 crop (6.9 + 230 = .03). As shown in the Additional Conclusions by the Judicial Officer, § I, there was an estimated 25% surplus for the 1984-85 crop and an estimated 20% surplus for the 1985-86 crop.]

a market for almond butter. Respondent notes that the Board vote on the recommendation, for the nine rules establishing reserves during the four-year Program, was unanimous eight of the nine times. (RX 2) There were nine rules because, for the 1984-85 and 1985-86 marketing years, there was more than one rule, as the reserve percentage was changed.

The Secretary's decision to institute the Program was supported by substantial evidence in the rulemaking record. The Secretary in his rulemaking capacity is required to make policy judgments. Petitioners must demonstrate that those judgments were arbitrary and capricious and not supported by evidence in the record. Petitions have not met that burden. The Secretary had a considerable amount of information before him consisting of Board meeting minutes, transcripts and reports, as well as the AMS field agent reports. (1982-83 crop year: PX 34, 36; RX 3, 4, 5, 6, 7, 15. 1983-84 crop year: PX 16, 41, 42; RX 18, 22, 24, 28. 1984-85 crop year: PX 46, 47, 48; RX 31, 35, 36, 37, 39, 40, 55; revisions: PX 19, 20, 21; RX 41, 44, 45, 46, 48, 49, 50, 52, 53, 59, 60. 1985-86 crop year: RX 56, 66, 67, 68, 69, 79, 80, 90; revisions: PX 23, 24, 61; RX 71, 72, 73, 77, 78.) The record was ample and sufficient for the Secretary to determine whether the Program would help meet the needs of the industry.

Petitioners did not meet their burden of proof with regards to the argument that a reserve cannot be imposed unless it is for supply management. Petitioners did not provide any support for this proposition. [Furthermore, the large anticipated surpluses for the 1984-85 crop and the 1985-86 crop *required* that a reserve be established for those years (see Additional Conclusions by the Judicial Officer, § I), irrespective of the Program, and the small anticipated surpluses for the 1982-83 crop and the 1983-84 crop would have authorized a reserve for those years, irrespective of the program.]

Appendix I

With regard to Petitioners' argument that the rule imposing the reserve for the 1983-84 crop year was more arbitrary and capricious than the rule for the 1982-83 year, because most of the reserve went to inedible outlets, the Secretary explains that the Program was new to the industry and it required a considerable start-up period. (PX 16) [Moreover, see note 7, *supra*.]

Petitioners provide no support for their argument that the Secretary did not independently, from the Board's recommendation, perform any analytical and judgmental functions to determine whether the recommended reserve amounts should have been adopted. Simply because the Secretary adopted the Board's recommendation does not lead to the conclusion that the Secretary rubber-stamped the Board's recommendations. The AMAA provides for a close working relationship between the Secretary and industry committees. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). Congress recognized the need to have industry committees comprised of experts in the respective industry to make recommendations to the Secretary:

> To the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the Agricultural Marketing Agreement Act of 1937, and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of the industry in how best to market a crop.

H.R. Rep. No. 271, 99th Cong., 1st Sess. 193. The court in *Chiglades Farm*, 485 F.2d at 1134, explained Congress' recognition that those with "the greatest knowledge of the industry's needs," the industry committees, would be qualified

to make the necessary recommendations to the Secretary to benefit the industry.

The Secretary's decision as to the reserve amount for marketing years 1984-85 and 1985-86 was not arbitrary and capricious. As discussed previously, the Secretary had before him all of the information from the Board with respect to the amount of reserve that was recommended and why. The Secretary had already approved of the Program, and almonds needed to be allocated for the Program [, and there was an estimated 25% and 20% surplus, respectively, for those years (see note 7, *supra*)]. There was substantial evidence in the rulemaking record to support the amount of the reserve for the years 1982-86.

The basis and purpose statements for the rules imposing the reserves from 1984-86, for the Program were "sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted." *Amoco Oil Co. v. EPA*, 501 F.2d 722, 739 (D.C. Cir. 1974). The reserve for the Program had been utilized since 1982. The basis and purpose of the reserve was clear by this time. The purpose of the reserve was to establish a market for almond butter to absorb the anticipated surpluses from the crops. This purpose was certainly reflected in the proposed and final rules. (RX 35, 36, 66, 67) The Secretary also responded to comments received after publication of the proposed rule. These rules did not differ from the ones imposing the reserve for the Program for the years 1982-83 and 1983-84.

. . . .[8]

[8. The omitted material is the ALJ's discussion of his conclusions 8 and 10, which state (Initial Decision at 19, 20):

(Cont'd)

Appendix I

* * *

that no handler shall receive almonds in excess of his contribution. Such restoration to the salable quantity shall be deemed to fulfill the obligation of the Board with respect to the increase in the salable percentage.

Nonetheless, since almost all handlers sign agency agreements, and dispose of their own almonds as agents of the Board, undoubtedly there is an economic incentive for handlers to sign agency agreements. That economic incentive (or even coercion) does not mean, however, that the Secretary was required to publish the Board's minimum prices and assessments through the rulemaking process. To consider this matter in the

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8. The Secretary was in error by not specifying the percentage of the reserve almonds to be allocated to the Program. (RX 36, 67) The allocation of the reserve to the Program had a substantial impact upon the rights and interests of the handlers and should have been promulgated through APA rulemaking. 7 U.S.C. § 553 (1988).

. . . .

10. The Secretary should have promulgated the determination of the minimum prices and special assessments on almonds disposed of under the Program through APA rulemaking. The minimum prices and special assessments were substantive in nature and affected the handlers' disposition of their reserve almonds. 5 U.S.C. § 553 (1988).

* * *

context of the specific agency agreements involved, the agency agreement entered into between the Board and handlers for the 1982-83 crop, which is typical of the others (RX 34, 65, 85), provides as follows (PX 38):

AGENCY AGREEMENT —
DISPOSITION OF RESERVE TO
NONCOMPETITIVE OUTLETS

THIS AGREEMENT, made this __ day of __, 19__, between the Almond Board of California, hereinafter referred to as "Board," and _____, a handler of almonds, hereinafter referred to as "Agent," WITNESSETH that:

WHEREAS, Section 981.66 of the Order of the Secretary of Agriculture regulating the handling of almonds grown in California, hereinafter referred to as the "Order," authorizes the Board to dispose of reserve almonds in noncompetitive outlets; and

WHEREAS, Section 981.67 of the Order permits handlers of almonds to become agents of the Board in such disposal; and

WHEREAS, Agent as a handler of almonds is subject to the provisions of the Order and has requested authority to act as agent of the Board in the disposition of reserve almonds; and

WHEREAS, timely information on

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Agent's intentions to dispose and dispositions of almonds into noncompetitive outlets is necessary for effective administration of the reserve and for marketing policy determinations of the Board;

NOW, THEREFORE IT IS AGREED BY AND BETWEEN the parties as follows:

1. *General.* (a) Subject to the provisions of Section 981.66 of the Order and the regulations applicable to the crop year, Agent is hereby authorized on behalf of the Board to dispose of reserve almonds held or acquired by agent and which are subject to the Board's disposal authority. Such disposition shall conform with such inspection, certification, and other disposition terms and conditions as the Board may herein prescribe or from time to time specify, and shall be subject to the limitations placed on the Board's disposal authority for the crop year.

. . . .

5. Agent, by signing this agreement certifies that:

(a) When almonds are to be used for almond butter,[17] he will comply with the

17. The agency agreements for 1984-85 and 1985-86 also referred to school lunches (RX 65, 85).

minimum prices of almonds as established by the Board. . . .

The minimum price schedule (established by the Board and approved by the Secretary) for the 1982-83 reserve program, which is typical of the others (PX 43, 58; RX 65, 84),[18] was as follows (RX 21):

MINIMUM PRICE SCHEDULE
1982-83 Reserve Program

1. *Minimum Prices*

a. Almond Butter

Minimum prices for reserve almonds sold for diversion to almond butter. Prices are per pound, FOB handler's plant — 25 pound containers or larger:

U.S. Select Sheller Run (or better)	
Unblanched	50 cents
Blanched	70 cents
U.S. Standard Sheller Run	
Unblanched	49 cents
Blanched	69 cents
U.S. Number 1 Whole and Broken and U.S. No. 1 Pieces	
Unblanched	48 cents
Blanched	68 cents

18. The 1984-85 and 1985-86 minimum prices were higher and minimum prices were set for the school lunch program (RX 65, 84; PX 58).

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Note: An advertising assessment of 10 cents per pound must be added to the above prices. The 10 cents per pound additional cost is charged "to generate advertising and general promotional funds for the butter program". The 10 cents per pound is refundable to manufacturers who buy reserve almonds to make butter and who comply with the advertising and promotion provisions of the butter program. Such refunds in turn are creditable by the Board to the handler's almond butter advertising assessment obligation. (Reference Addendum 2 to minimum Price Schedule.)

b. USDA School Lunch

Minimum prices for reserve almonds sold for diversion to USDA school lunch. Prices are per pound, FOB handler's plant:

Whole natural	70 cents
Roasted, unsalted	95 cents
Roast:	Oil or dry
Varieties:	Nonpareil, California, NePlus
Grade:	U.S. No. 1
Size:	30 or larger
Packaging:	25 lb carton for whole natural 25 lb. carton vacuum sealed packs for roasted

Turning now to the relevant provisions of the Order, the Order requires handlers to comply with reserve obligations. The Order states (7 C.F.R. § 981.46):

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§ 981.46 Withholding reserve.

When a reserve percentage has been fixed for any crop year, as hereinafter provided, no handler shall handle almonds except on condition that he comply with the requirements in respect to withholding reserve almonds and the prescribed disposition thereof.

A handler may meet his reserve obligation by signing an agency agreement with the Board, i.e., by becoming an agent of the Board, and disposing of his almonds in accordance with the Board's requirements, *or* by delivering his almonds to the Board. The Order provides (7 C.F.R. §§ 981.51, .52):

§ 981.51 Requirements for reserve.

Each handler may satisfy his reserve obligation with such almonds specified in the terms of the agency agreement authorized in § 981.67, including all applicable inspection and certification requirements. Any handler who does not become an agent may receive credit by similarly delivering almonds to the Board or its designees. These requirements may be established by the Board, with the approval of the Secretary, and from time to time so modified, and may include grade requirements for reserve almonds delivered to human consumption outlets.

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§ 981.52 Holding requirement and delivery.

Each handler shall, at all times, hold in his possession or under his control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation less: (a) Any quantity which was disposed of by him pursuant to § 981.67 [i.e., by becoming an agent of the Board]; and (b) any quantity for which he is otherwise relieved by the Board of responsibility to so hold almonds. Upon demand of the Board reserve almonds shall be delivered to the Board f.o.b. handler's warehouse or point of storage, except that the Board shall not make such demand upon a handler with respect to reserve almonds for which he has agreed to undertake disposition pursuant to § 981.67. Any handler who does not act as agent for the Board in the disposition of reserve almonds shall be subject to the applicable inspection and certification requirements prescribed by the Board pursuant to § 981.67.

Of overriding importance is the fact that the Order gives the Board complete power and authority to dispose of *all* reserve almonds. The Order states (7 C.F.R. § 981.66(a)):

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§ 981.66 Conditions governing disposition of reserve.

(a) *General.* The Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable consistent with the ultimate complete disposition of reserve, subject to all conditions of this section.

Section 981.66 of the Order contains a number of other subsections, one of which, subsection (c), specifies the uses to which reserve almonds can be put, including diversion into almond butter (7 C.F.R. § 981.66(C)), quoted in § I of the Judicial Officer's additional conclusions.

Section 981.66 also sets forth subsections relating to expenses and distribution of reserve proceeds, as follows (7 C.F.R. § 981.66(f), (g)):

(f) *Expenses.* Direct expenses incurred by the Board in the maintenance and disposition of reserve almonds shall be charged against the proceeds of sales of such almonds.

(g) *Distribution of proceeds.* Net proceeds from the disposition of reserve almonds by the Board shall be distributed to each handler in proportion to his relative share of such disposition in terms of creditable reserve kernel weight pursuant to

§ 981.51 or such other basis as the Board may adopt with the approval of the Secretary.

In lieu of turning over reserve almonds to the Board, so that the Board may dispose of them, a handler may become an agent of the Board, for the purpose of disposing of the reserve almonds, by signing an agency agreement. The Order provides (7 C.F.R. § 981.67) (emphasis added):

§ 981.67 Disposition by handler.

Upon request of a handler, made prior to the delivery by him of any reserve to the Board in any crop year, *the Board shall authorize such handler to act as agent of the Board, upon such reasonable terms and conditions*, including inspection and certification requirements, *as the Board may specify* and subject to the conditions of § 981.66 in disposing of the reserve withheld from handling by such handler for that crop year. Any handler who is authorized to dispose of his reserve may, through arrangement with another handler dispose of such reserve through such other handler, or in lieu of disposition, may acquire credits for reserve disposition from another handler. In the first instance, the second handler shall also be subject to the conditions of 981.66. It shall be the obligation of any handler authorized to dispose of such reserve to effect disposition thereof in accordance with all applicable requirements and conditions. The

proceeds of such disposition shall be retained by the handler making the disposition, except that, in case he disposes of the reserve of another handler, the proceeds from that disposition shall be divided between the handlers on the basis of a mutual agreement. Such authorization shall expire as of September 1 of the next crop year, and any reserve then remaining undisposed of by the handler shall be returned to the Board. If the date of September 1 specified in § 981.66(e) is extended, the date of September 1 shall be extended correspondingly. Any handler who has been authorized to act as agent of the Board in disposing of his reserve may terminate such agency as of April 1 of the particular crop year by giving written notice to the Board to that effect not later than the previous March 20, in which event such handler shall return to the Board, for disposition by it, all reserve almonds remaining in his possession. In case a handler does not terminate his agency as of April 1, he shall be required to continue to serve as such agent until September 1 of the next crop year. The Board shall not terminate such an agency prior to September 1 unless the agent violates the terms and conditions specified by the Board or other provisions of the order. During the period of such agency the Board, as principal, shall not dispose of the reserve withheld from handling by said rules and regulations as are necessary to regulate

> dispositions of reserve almonds including method for crediting as reserve any salable almonds sold and delivered to reserve outlets.

Since the Order (promulgated on the basis of a formal rulemaking record, which is not challenged as to this issue) gives the *Board* the full power and authority to sell or dispose of all the reserve almonds, subject only to the conditions of the Order, and the Secretary's right to disapprove, it does not matter whether a handler is economically compelled to enter into an agency agreement. Whether or not there is an agency agreement, the Board has complete power as to all reserve almonds. The Board must comply with the express provisions of the Order, and it is subject to the power of the Secretary to veto any Board action. But the Board does not have to seek handler approval or concurrence with respect to anything relating to the disposition of reserve almonds. For the purposes of this proceeding, the hearing record supporting the Board's plenary authority as to reserve almonds is not challenged.

Whether it was wise to give the Board complete authority to dispose of the reserve almonds as it sees fit, subject only to the conditions set forth in the Order and the Secretary's veto authority, is not open to question in this administrative review proceeding. Wisely or unwisely, under the Order, handlers have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds and, therefore, it is enough that the Secretary approved the minimum prices and assessments determined by the Board for the Program for almond butter and school lunches, without seeking the advice and consent of handlers, or promulgating the Board's determinations through APA rulemaking.

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Assuming that the Secretary was required to promulgate through APA rulemaking the minimum prices and special assessments for reserve almonds disposed of for almond butter and school lunches, the Act does not authorize the award of consequential, monetary damages (as distinguished from a return of monies paid) (see § I, Additional Conclusions by the Judicial Officer), and, therefore, nothing could be done for petitioners here, even if the Secretary erred in this respect (which is not the case).

III. The Secretary Was Not Required to Allow Notice and Comment on the Rule Extending the Date for Disposing of Reserve Almonds from September 1, 1986, to March 1, 1987.

The ALJ held that it was error for the Secretary to fail to allow notice and comment on the rule issued August 20, 1986, and published August 25, 1986 (PX 25; 51 Fed. Reg. 30,203, 30,204 (1986)), extending the date for disposing of reserve almonds from September 1, 1986, to March 1, 1987, stating (Initial Decision at 53-59):

> Petitioners argue that the Secretary's action on or about August 20, 1986, extending the date for disposing of reserve almonds from September 1, 1986 to March 1, 1987, violated the APA. Petitioners contend that the Secretary should have issued a proposed rule and allowed notice and comment. Instead, the Secretary merely issued a final rule. (PX 25)
>
> Relying on the AMS field agent's report,

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Petitioners assert that the recommendation by the Board to extend the date for disposition of the reserve almonds was unfair. The report provides in relevant part:

> Chairman Walt Payne reported the recommendations and discussion of the Market Development Committee. Based upon the recommendation of the committee, the ABC recommended that the Secretary extend the effective date for disposition of reserve almonds from September 1, 1986, to March 1, 1987. This action is authorized under section 981.66(e) and would permit the industry to dispose of about 6.6 million pounds of unsold reserve almonds over a longer period of time and so help prevent the sales from unduly depressing prices in the market. It also enables the industry to supplement the reduced 1986-87 crop supply by carrying over 6.6 million pounds from the large 1985-86 crop. The ABC motion was made on a nine to one vote, with Cloyd Angle voting in opposition. Mr. Angle, and certain others at the meeting indicated that they believed CAGE had taken advantage of its dominance in the industry and on the ABC in this action. They contended that when the low

crop estimate for the 1986 crop was announced in April that

* * *

new rulemaking procedure, but consideration would still have to be given as to whether reimbursement is just and reasonable considering all of the circumstances, whether laches would preclude recovery for some of the years, and whether all handlers should voluntarily be reimbursed by the Secretary (see § V, Additional Conclusions by the Judicial Officer).

VII. There Is No Merit to Petitioners' Appeal.

Petitioners appeal all of the issues decided adversely to them by the ALJ, except the ALJ's rejection of their third argument under the ALJ's § V (holding that § 981.441 of the Order did not have to promulgated through formal ruelmaking rather than informal rulemaking). Petitioners' appeal is, in the main, a rehash of the arguments fully briefed before the ALJ and fully briefed in respondent's responses before the ALJ, In my view, the ALJ correctly decided those issues, and no useful purpose would be served by further discussion here. Briefly, however, it should be noted that petitioners repeatedly argue that when the cooperative bloc-votes against a minority recommendation, the Secretary never gets a chance to consider the minority view. That is not true. Minority views in minutes or elsewhere are transmitted to the Secretary (TR. 436; see, e.g., RX 87, at 4-5, reporting the Board's 9-1 vote, and discussing the dissenting view of the single dissenter (Cloyd Angler, President of Petitioner Cal-Almond, Inc.,); PX 62, at 6 (top ¶); PX 63, at 58-60).

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For the foregoing reasons, the following order should be issued.

Order

The relief requested by petitioner is denied and the amended petition is dismissed.

Done at Washington, D.C.

January 23, 1991

s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

APPENDIX J — FIRST AMENDED COMPLAINT FILED AUGUST 19, 1992

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IN THE UNITED STATES CLAIMS COURT

NO. 92-477 C

CAL-ALMOND, INC., a California corporation; GOLD HILLS NUT COMPANY, a California corporation; SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., a California corporation; BROWNS LAKE RANCH, a Partnership consisting of Paul McManis and William Reeves; MAC ENTERPRISES, INC., a California corporation; VAN KAY, INC., a California corporation; and DERK VAN KONYNENBURG,

Plaintiffs,

vs.

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THE UNITED STATES,

Defendant.

FIRST AMENDED COMPLAINT

NOW COME the Plaintiffs, CAL-ALMOND, INC., a California corporation (hereinafter "Cal-Almond"), GOLD HILLS NUT COMPANY, a California corporation (hereinafter "Gold Hills"), SAULSBURY ORCHARDS AND ALMOND PROCESSING, a California corporation (hereinafter "SOAP"), BROWNS LAKE RANCH, a Partnership consisting of Paul McManis and William Reeves (hereinafter "Browns Lake Ranch"), MAC ENTERPRISES, INC., a California corporation (hereinafter "Mac Enterprises"), VAN KAY, Inc., a California corporation (hereinafter "Van Kay"), and DERK VAN KONYNENBURG, (hereinafter "Van Konynenburg"), and for their cause of action against the Defendant UNITED STATES state as follows:

1. This is a civil action for money damages in excess of TEN THOUSAND DOLLARS ($10,000.00) arising under the Fifth Amendment to the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1346(a) and 28 U.S.C. § 1491, and the principles set forth in *Kirby Forrest Industries v. United States*, __U.S. ___, 104 S.Ct. 2187 (1984), *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351 (1980), *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138 (1980), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2738 (1987), and *Yancey v. United States*, 915 F.2d 1534 (Fed.Cir. 1990).

2. At all relevant times herein, unless expressly indicated

to the contrary, Plaintiffs Cal-Almond, Inc., Gold Hills and SOAP were handlers of almonds in the State of California, and governed and regulated by the Agricultural Marketing Agreement Act, as amended in 1937 (7 U.S.C. § 601, et seq.) (the AMAA), and the Almond Marketing Order (7 C.F.R. § 981.1, et seq.). Plaintiffs Browns Lake Ranch, Mac Enterprises, Van Kay and Derk Van Konynenburg were, at all relevant times mentioned herein unless expressly indicated to the contrary, growers and farmers of almonds in the State of California whose product is and was regulated by the Agricultural Marketing Agreement Act and the Almond Marketing Order. All Plaintiffs reside in and have their principal places of business within the State and Eastern District of California.

3. The Defendant is the United States of America; their agencies and agents include the United States Department of Agriculture and the Almond Board of California.

4. During the years 1982 through 1986, and thereafter, Cal-Almond and SOAP were handlers of almonds in the State of California and subject to the AMAA and Almond Marketing Order. As handlers, Cal-Almond and SOAP purchased almonds from growers of California almonds, hulled and shelled said almonds, processed said almonds, and readied said almonds for market, and then marketed said almonds. SOAP and Cal-Almond would realize a profit on the sale of said almonds after providing a fair return to the respective growers from whom they purchased the almonds. SOAP and Cal-Almond have expended substantial sums of monies, in excess of several million dollars, buying the land, building the plant and facility on said land, and purchasing hundreds of thousands of dollars worth of equipment in order to process, store, fumigate and ready-for-market the almonds that they purchased from their respective growers.

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They have also expended substantial sums of money hiring "field personnel" to contact growers and purchase their crops. Prior to the 1982 almond crop year, SOAP and Cal-Almond reasonably believed that they would be able to process and market in fully salable channels all of the almonds that they purchased from their growers and realize a reasonable profit from said sales, and if a reserve was to be imposed it would increase revenue as intended by the AMAA and the Almond Marketing Order. Instead, the reserves complained of herein drastically reduced revenue. In the following almond crop years, Cal-Almond and SOAP received and purchased from their respective growers, and reasonably believed that it could market, the following number of pounds of almonds:

CAL-ALMOND:

Crop Year	Approximate Pounds Received
1982	3.3 Million
1983	3.3 Million
1984	6.7 Million
1985	6.1 Million

SOAP:

Crop Year	Approximate Pounds Received
1982	10.0 Million
1983	6.8 Million
1984	17.1 Million
1985	9.0 Million
1988	1.6 Million
1990	.55 Million

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5. Plaintiff Gold Hills was a handler of California almonds for a number of years, including the years 1988 through the 1990-1991 almond crop year. Gold Hills spent a substantial amount of money acquiring the land, building and equipment in order to receive, process and ready for market the almonds Gold Hills purchased from its growers, with the expectation that Gold Hills would be able to sell all of the almonds purchased from said growers, and if a reserve was to be imposed it would increase revenue as intended by the AMAA and the Almond Marketing Order. Instead, the reserves complained of herein drastically reduced revenue. For the 1988 crop year Gold Hills purchased from its growers for sale approximately 1.27 Million pounds of almonds. For the 1990-1991 crop year, Gold Hills purchased from its growers, and fully anticipated marketing all of said almonds, approximately 3.0 Million pounds of almonds.

6. Beginning immediately after the almond harvest in 1989, Plaintiff growers Mac Enterprises, Browns Lake Ranch, Van Kay and Van Konynenburg began expending substantial sums of money preparing their orchards for the 1990 almond crop and expending in excess of TWO THOUSAND DOLLARS ($2,000.00) per acre on their property through the 1990 almond harvest which began in August of 1990. Plaintiff Browns Lake owns and farms approximately 200 acres of almonds, Plaintiff Mac Enterprises owns and farms approximately 300 acres of almonds, Plaintiff Van Kay owns and farms approximately 60 acres of almonds, and Plaintiff Van Konynenburg owns and farms approximately 190 acres of almond orchards, all in the State and Eastern District of California.

7. For the 1990 crop year, Plaintiff Browns Lake Ranch produced off of its orchards and delivered to its handler, Cal-Almond, Inc., approximately 488,140 pounds, Mac Enterprises

produced and delivered to its handler, Cal-Almond, Inc., approximately 859,567 pounds of almonds, Van Kay, Inc. produced and delivered to its handler, Cal-Almond, Inc., approximately 87,111 pounds of almonds, and Plaintiff Van Konynenburg produced and delivered to its handler, Cal-Almond, Inc., approximately 338,648 pounds of almonds.

8. All of the grower Plaintiffs reasonably believed at the time they purchased the acreage for their orchards, planted their orchards, and expended substantial production costs on those orchards, that they would readily be able to market all of the almonds produced from their acreage into the fully salable and competitive channels for almonds and receive a reasonable return for their production of almonds, and if a reserve was to be imposed it would increase revenue as intended by the AMAA and the Almond Marketing Order. Instead, the reserves complained of herein drastically reduced revenue. From the conclusion of the harvest in 1989, up through their harvest in 1990, Plaintiff growers expended substantial sums of money, and spent substantial time and effort on their orchards, reasonably believing that their product would be fully salable. The contract they had with their handler, Cal-Almond, only obligated Cal-Almond to pay Plaintiff growers for the portion of the crop that was salable. This condition is typical throughout the almond industry as no handler will pay a grower for almonds the handler is forbidden from marketing.

9. The AMAA and the Almond Marketing Order regulate handlers of California almonds, which handlers include, among others, Plaintiffs Cal-Almond, SOAP and Gold Hills. However, the Almond Marketing Order and the AMAA regulate, as well, products governed by a marketing order, and in the case of the Almond Marketing Order, it regulates and governs almonds

produced in the State of California, including the almonds grown by Plaintiffs Browns Lake Ranch, Mac Enterprises, Van Kay and Van Konynenburg.

10. One of the provisions of the Almond Marketing Order is that, upon the recommendation of the Almond Board of California, made up of growers and handlers in the industry, the Secretary can impose a reserve upon all almonds grown in the State of California. According to the Almond Marketing Order, when a reserve is imposed, the almonds no longer belong to the handler (or to the grower) but belong to the United States Department of Agriculture. When a reserve is imposed, by publication in *The Federal Register,* the handlers are required to hold those almonds for the account of the Almond Board, which is an arm and an agency of the United States Department of Agriculture. The almonds cannot be sold into salable and lucrative outlets but must be stored by the handler, at considerable cost, for the benefit of USDA. On occasion, USDA will, some time during the Marketing Order crop year (July 1 through June 30), release all of the almonds previously ordered held as reserve, and permit those almonds to be sold into the salable outlets. On other occasions, USDA will not release those almonds into the salable categories, but will order those almonds sold or distributed into non-competitive, very low-value outlets, such as cattle feed, almond oil, almond butter, or for distribution to charitable organizations. In order to dispose of said almonds that are not released by the Secretary, a handler must turn over those almonds to the Almond Board of California unless the handler signs an "Agency Agreement" issued by the Almond Board and USDA, requiring the handler, under pain of civil and criminal penalties, to dispose of said almonds pursuant to the terms and conditions of the Agency Agreement. If a handler does not comply with the agency agreement, or sells reserve almonds

into competitive outlets, or does not properly store said almonds in the State of California at all times when the reserve is in place, the handler is subjected to severe criminal and civil penalties. The handlers' premises must be accessible to USDA and the Almond Board, audits are conducted, and the handler is required to donate his time, labor and equipment to USDA and the Almond Board for their audits and inspections.

11. A Judicial Officer for the United States Department of Agriculture has declared that under the terms of the Almond Marketing Order, when a reserve is in place the marketing order for almonds gives the Board and USDA "complete power and authority to dispose of all reserve almonds." The Judicial Officer has also stated:

> "Since the Order (promulgated on the basis of a formal rulemaking record, which is not challenged as to this issue), gives the *Board* the full power and authority to sell or dispose of all reserve almonds, subject only to the conditions of the Order, and the Secretary's right to disapprove, it does not matter whether a handler is economically compelled to enter into an Agency Agreement. Whether or not there is an Agency Agreement, the Board has complete power as to all reserve almonds. The Board must comply with the express provisions of the Order, and it is subject to the power of Secretary to veto any Board action. But the Board does not have to seek handler approval or concurrence with respect to anything relating to the disposition of reserve almonds. For the purposes of this

> proceeding, the hearing record supporting the Board's plenary authority as to reserve almonds is not challenged. Whether it was wise to give the Board complete authority to dispose of the reserve almonds as it sees fit, subject only to the conditions set forth in the Order, and the Secretary's veto authority, is not open to question in this administrative review proceeding. Wisely, or unwisely, under the Order, handlers have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds and, therefore, it is enough that the Secretary approved the minimum prices and assessments determined by the Board for the program for almond butter and school lunches, without seeking the advice and consent of handlers, or promulgating the Board's determinations through APA rulemaking."

12. Pursuant to the Almond Marketing Order, in 1982 the Secretary ordered that two percent (2%) of all the almonds received by Plaintiff handlers Cal-Almond and SOAP be disposed of pursuant to an Agency Agreement (or given to the Almond Board in the absence of an Agency Agreement). In 1983 USDA ordered three percent (3%) of all the almonds handled by the Plaintiff handlers Cal-Almond and SOAP be disposed of pursuant to the Agency Agreement (or given to the Almond Board in the absence of an Agency Agreement). In 1984 USDA ordered that five percent (5%) of all the almonds handled by the Plaintiff handlers Cal-Almond and SOAP be disposed of pursuant to the Agency Agreement (or given to the Almond

Board in the absence of an Agency Agreement). In 1985 USDA ordered that ten percent (10%) of all the almonds handled by the Plaintiff handlers Cal-Almond and SOAP be disposed of pursuant to the Agency Agreement (unless provided to the Almond Board in lieu of an Agency Agreement). Plaintiffs Cal-Almond and SOAP were handlers during the 1982 through the 1985 crop years. Thus, in 1982 Cal-Almond was ordered to dispose of 66,000 pounds of almonds into low-value non-competitive outlets, and was precluded from selling said almonds in the open, lucrative market. In 1982 SOAP was ordered to dispose of 220,000 pounds of almonds into low-value non-competitive outlets, and was precluded from selling said almonds in the open, lucrative market. In 1983 Cal-Almond was ordered to dispose of 99,000 pounds of almonds into low-value non-competitive outlets, and was precluded from selling said almonds in the open, lucrative market. In 1983 SOAP was ordered to dispose of 204,000 pounds of almonds into low-value non-competitive outlets, and was precluded from selling said almonds in the open, lucrative market. In 1984 Cal-Almond was ordered to dispose of 335,000 pounds of almonds into low-value non-competitive outlets, and was precluded from selling said almonds in the open, lucrative market. In 1984 SOAP was ordered to dispose of 855,000 pounds of almonds into low-value non-competitive outlets, and was precluded from selling said almonds in the open, lucrative market. In 1985 Cal-Almond was ordered to dispose of 620,000 pounds of almonds into low-value non-competitive outlets, and was precluded from selling said almonds in the open, lucrative market. In 1985 SOAP was ordered to dispose of 900,000 pounds of almonds into low-value non-competitive outlets, and was precluded from selling said almonds in the open, lucrative market.

13. In addition, any almonds sold into almond butter for the

1982 through the 1985 crop years, USDA charged all handlers an extra ten cents (10¢) per pound that the handlers had to pay to the Board if they were selling almonds into almond butter. For the 1983-1984 crop year, USDA and the Almond Board assessed each handler an extra ten cents (10¢) per pound for all almonds (the 3%) which were ordered disposed of into non-competitive outlets, regardless of whether or not the almonds were sold for almond butter or into cattle feed or almond oil. Thus, the Almond Board collected from Cal-Almond for the 1983-1984 crop year an additional $9,900.00. Thus, the Almond Board collected from SOAP for the 1983-1984 crop year an additional $20,400.00. This special assessment amounted to a TAKING entitling Plaintiffs SOAP and Cal-Almond to receive just compensation, i.e, the amount taken (i.e., taxed) plus interest.

14. In 1982 through 1985, Cal-Almond and SOAP could not find any readily-available outlet for almond butter. Although there were purported almond butter manufacturers which formed during this program from 1982 through the 1985-1986 crop year, many of them were believed by SOAP and Cal-Almond to be not legitimate almond butter manufacturers, and Cal-Almond and SOAP could not take the chance of selling reserve almonds to those purported manufacturers because the Almond Board and USDA declared that if any handler shipped those reserve almonds into those outlets and it was later determined that those outlets were not making almond butter, the handler would lose the credit for that sale, and would have to take salable tonnage and provide it to the Almond Board. Therefore, for the 1982 through 1985-1986 crop years, SOAP and Cal-Almond sold almost all of their reserve almonds for cattle feed at less than ten cents (10¢) per pound. For the 1982 through the 1985 crop year, the salable market price for all almonds exceeded One Dollar ($1.00) per pound and in an amount to be proven at

trial. Thus, SOAP and Cal-Almond were forced to sell said almonds during the 1982 through 1985-1986 crop years at a substantial loss, and a net loss to them, whereas they could have realized a substantial profit had they been permitted to sell said almonds in the open market for in excess of One Dollar ($1.00) per pound, in an amount to be proven at trial. SOAP and Cal-Almond allege that the almond reserve program from 1982 through 1985 never raised grower returns nor increased the price for the salable almonds. SOAP and Cal-Almond allege that their reasonable investment-backed expectation was that if a reserve was imposed it would raise overall revenue as contemplated by the Agricultural Marketing Agreement Act — but it did not; it drastically lowered over all revenue. SOAP and Cal-Almond challenged the reserve through statutorily mandated exhaustion requirements. However, it was not until January of 1991 that the Secretary, through the Judicial Officer, ruled on the administrative claim of SOAP and Cal-Almond. Thus, any statute of limitations has been tolled during the pendency of this exhaustion requirement. Therefore, from 1982 through the 1985 crop year, Cal-Almond was forced to sell what were 1,120,000 pounds of its almonds, but by operation of the AMAA and the Almond Marketing Order became the USDA's and the Almond Board's almonds, at less than ten cents (10¢) per pound when it could have sold them for in excess of One Dollar ($1.00) per pound, all of which amounted to a TAKING requiring just compensation in an amount to be proven at trial. From 1982 through the 1985 crop year, SOAP was forced to sell what were 2,179,000 pounds of its almonds, but by operation of the AMAA and the Almond Marketing Order became the USDA's and the Almond Board's almonds, at less than ten cents (10¢) per pound when it could have sold them for in excess of One Dollar ($1.00) per pound, all of which amounted to a TAKING requiring just compensation in an amount to be proven at trial.

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15. For the 1988 crop year the Secretary of Agriculture issued a twenty-five percent (25%) reserve in January of 1989, and made it retroactive to the beginning of the crop year which began July 1, 1988. This twenty-five percent (25%) reserve required SOAP to hold, without selling, in excess of 400,000 pounds of almonds. This twenty-five percent (25%) required Gold Hills to hold and not market in excess of 317,000 pounds of almonds. While the Secretary later released the reserve as of August 1, 1989, thereby permitting Plaintiffs SOAP and Gold Hills to market that twenty-five percent (25%) reserve, the pure cost to each SOAP and Gold Hills in holding the reserve for the Almond Board and USDA was in excess of seventeen cents (17¢) per pound, which was not recouped by the handlers when the product was later released for sale. Thus, the cost incurred by Plaintiff Gold Hills for holding the reserve for USDA was in excess of $54,000.00. The cost incurred by SOAP directly relating to holding the twenty-five percent (25%) reserve for USDA and the Almond Board was in excess of $68,000.00. These costs are directly related to a TAKING entitling SOAP and Gold Hills to an equivalent amount, plus interest, as their just compensation. All of these costs include, but are not limited to, fumigation costs, shrinkage (in weight due to holding for that extended period of time), interest and finance charges due to the bank, storage and cold storage (including labor associated with the same), and insurance. Gold Hills and SOAP are entitled to just compensation for these costs since the twenty-five percent (25%) reserve amounted to a TAKING. SOAP and Gold Hills allege that the almond reserve program for the 1988 crop year never raised grower returns nor increased the price for the salable almonds. SOAP and Gold Hills allege that their reasonable investment-backed expectation was that if a reserve was imposed it would raise overall revenue as contemplated by the Agricultural Marketing Agreement Act — but it did not; it drastically lowered over all revenue.

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16. For the 1990-1991 almond crop, the Secretary imposed a thirty-five percent (35%) reserve. The effective date of the final rule was not until approximately October 22, 1990, but the Secretary made it retroactive to the beginning of the crop year, July 1, 1990. Seven percent (7%) of the entire crop has been ordered disposed of into non-competitive, low-value outlets. These outlets are defined in the Almond Marketing Order and in the Agency Agreement. Five percent (5%) of the reserve was released by USDA in February, 1991, another ten percent (10%) was released in the middle of March, 1991, and thirteen percent (13%) was released several months later. However, seven percent (7%) of the entire crop was ordered disposed of into the exempt, low-value outlets listed in the Marketing Order and in the Agency Agreement. The seven percent (7%) reserve, unless sold into cattle feed or almond oil, must be sold at a minimum price determined by USDA, into these few other low-value outlets which minimum price amounts to approximately half of the value of the product if it were permitted to be sold into fully salable channels. However, because the seven percent (7%) amounts to approximately 42 million pounds, and because there is a drastically short supply of demand for the product, the minimum price has become the maximum price, and that has caused over one-third (1/3rd) of the almonds in that seven percent (7%) reserve to be sold into cattle feed and almond oil at less than ten cents (10¢) per pound, when the market for said almonds is in excess of $1.50 per pound. If that seven percent (7%) is not sold into the outlets listed in the Almond Marketing Order and the Agency Agreement, it must be turned over to the Almond Board. Requiring SOAP and Gold Hills to hold onto, initially, the thirty-five percent (35%) reserve, then a thirty percent (30%) reserve, then a twenty percent (20%) reserve, has cost these two handling entities substantial sums of money in storage, fumigation, insurance and interest costs, in an amount

to be proven at trial as it all constitutes a TAKING. In addition, ordering seven percent (7%) of the product to be disposed of into the non-competitive outlets means that Plaintiff SOAP was obligated to dispose into these non-competitive, low-value outlets approximately 38,000 pounds, at a net loss in excess of $19,000.00 or an amount to be proven at trial. Plaintiff Gold Hills was forced to dispose of approximately 210,000 pounds of almonds into the non-competitive, low-value outlets, which cost Gold Hills in excess of thirty cents (30¢) per pound, i.e., in excess of $63,000.00. The cost of holding the remaining thirty-five percent (35%) reserve, for a several month period, a thirty percent (30%) reserve for several more months, and a twenty percent (20%) reserve for even longer, will cost each of the handler Plaintiffs a substantial sum of money, in an amount to be proven at trial. The costs associated with that portion of the reserve also includes insurance, interest paid to the bank, storage, shrinkage, labor and fumigation. SOAP and Gold Hills allege that the almond reserve program for the 1990-1991 crop year never raised grower returns nor increased the price for the salable almonds. SOAP and Gold Hills allege that their reasonable investment-backed expectation was that if a reserve was imposed it would raise overall revenue as contemplated by the Agricultural Marketing Agreement Act — but it did not; it drastically lowered over all revenue.

17. In addition, USDA has assessed the Plaintiff SOAP 2.77¢ per pound on all of these almonds for the 1990 crop year, and this amounts to a TAKING requiring the return of an equivalent amount plus interest as just compensation.

18. Plaintiff Browns Lake Ranch produced and delivered to its handler 488,140 pounds of almonds for the 1990-1991 almond crop. Plaintiff Mac Enterprises produced and delivered

to its handler 859,567 pounds of almonds for the 1990-1991 almond crop. Plaintiff Van Kay produced and delivered to its handler 87,111 pounds of almonds for the 1990-1991 almond crop. Plaintiff Van Konynenburg produced and delivered to its handler 338,648 pounds of almonds for the 1990-1991 almond crop. Since the Almond Marketing Order regulates almonds grown in California, Plaintiff growers have had at least seven percent (7%) of their product taken from them this year by USDA and the Almond Board of California. Since a handler is forbidden from selling seven percent (7%) of the product, the Plaintiff growers are precluded from getting paid for seven percent (7%) of their product, even though they spent substantial productions costs in growing the almonds in question, reasonably believing during that time of buying the acreage, planting the orchards, caring for the orchards, and expending substantial sums of money on said orchards, they would be entitled to market one hundred percent (100%) of their crop. In addition, while the Secretary has the thirty-five percent (35%) reserve in effect, and then while the Secretary had the thirty percent (30%) reserve in effect, and then the twenty percent (20%) reserve, Plaintiffs cannot be paid for that portion of their crop. This has cost the Plaintiff growers substantial sums of money in an amount to be proven at trial, but in excess of the minimum jurisdictional requirement of the Claims Court as this reserve amounts to a TAKING requiring just compensation.

19. At all relevant times herein, all of the Plaintiffs had a property interest through their ownership of the almonds produced in the State of California.

20. The actions taken by USDA as hereinabove alleged, deprived the Plaintiffs of all economically viable use of their almonds in the amounts stated above and for the time frames in

question, and interfered substantially with Plaintiffs' distinct investment-backed expectations, in that the handler Plaintiffs spent substantial sums of money acquiring property, building a plant for processing and marketing almonds, acquiring equipment to process said almonds, hiring employees to purchase almonds from growers, developing relationships with buyers for the sale of all of Plaintiff-handlers' product, and, with respect to the grower Plaintiffs, in acquiring the acreage in question, planting the almond trees in question, spending substantial sums of money in caring for said orchards, paying taxes on said orchards, and providing the cultural costs necessary to produce the almond from year to year. All Plaintiffs allege that they had reasonable investment-backed expectations, because of the AMAA and the Almond Marketing Order, that if a reserve was imposed it would increase overall revenue to producers and handlers, but the reserves imposed as described in this Complaint drastically reduced revenue — all to the Plaintiffs' damage.

21. In fact, the actions taken by the officials of USDA and the Almond Board was even more than just an economic regulation amounting to a TAKING; the impact of the almond Marketing Order and the AMAA upon Plaintiffs' almonds resulted in the USDA and the Almond Board becoming the owners of the reserve almonds and ousting Plaintiffs from all right, title and claim to said almonds. This amounted to a physical and legal occupation of said almonds and a possessory interest in said almonds, which is a *de facto* TAKING requiring just compensation in an amount to be proven at trial and approximately the amounts stated above.

22. As a result of the facts set forth as hereinabove described, the Plaintiffs' almonds were taken by the United

States for public use without just compensation in violation of the Fifth Amendment to the United States Constitution and Plaintiffs were taxed on said almonds as herein described even though the almonds in question became the property of the Defendant, and since the reserves and assessments were applied retroactively to the beginning of the crop year, the almonds in question immediately became the property of the USDA and the Almond Board. These reserves and assessments as described herein amounted to a TAKING requiring just compensation in an amount to be proven at trial.

23. The aforesaid violation of the Fifth Amendment of the United States Constitution has damaged the Plaintiffs in amounts hereinabove set forth, being the fair market value of the property interest taken away, and being the costs incurred by the Plaintiffs in holding the almonds for the Defendant and their agents and also being the amounts assessed on said almonds.

24. WHEREFORE, all of the Plaintiffs pray that this Court grant them judgment against the United States in amounts as hereinabove set forth, or in amounts to be established at trial, together with applicable interest, prejudgment interest from the time of the TAKING, the costs and attorney's fees in bringing this action, and such other relief as the Court may deem proper.

DATED: August 18, 1992 BRIAN C. LEIGHTON

DATED: August 18, 1992 JAMES A. MOODY
Attorneys for Plaintiffs

APPENDIX K — PROPOSED FINDINGS OF UNCONTROVERTED FACTS

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IN THE UNITED STATES CLAIMS COURT

NO. 92-477C

CAL-ALMOND, INC., a California corporation; GOLD HILLS NUT COMPANY a California corporation; SAULSBURY ORCHARDS AND ALMOND PROCESSING, a California corporation; BROWNS LAKE RANCH, a Partnership consisting of Paul McManis and William Reeves; MAC ENTERPRISES, INC., a California corporation; VAN KAY, INC., a California corporation; and DERK VAN KONYNENBURG,

Plaintiffs,

vs.

Appendix K

THE UNITED STATES,

Defendant.

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* * *

III

PLAINTIFFS' PROPOSED FINDINGS OF UNCONTROVERTED FACTS

Plaintiffs offer the following Proposed Findings Of Uncontroverted Facts, which are taken from the AMAA, the Almond Marketing Order, and the exhibits and Declarations lodged with the previously-filed briefs. Plaintiffs reserve the right to offer additional proposed findings of uncontroverted facts, depending upon the Government's reply, as well as the *amount* of *just compensation* owed to the Plaintiffs.

A. General And Specific Almond Marketing Order Regulations

1. The almond crop year is meant by the regulation to begin July 1 and end the following June 30. [7 C.F.R. § 981.19.]

2. Prior to August 1 of any crop year the Almond Board shall make a recommendation to the Secretary of Agriculture (hereinafter "the Secretary"), by the affirmative vote of at least 6 members whether a reserve should be imposed for that crop year. [7 C.F.R. § 981.49.]

3. For the Almond Board to make such a recommendation, they are to take into consideration the quantity of marketable almonds to be produced, how many almonds were carried over from the previous year as of July 1, how many almonds are desired to be carried over on the following July 1 (carried over means not sold, either voluntarily or because of market conditions, the carry-over being the amount of almonds the Board determines that the industry needs to have on hand to sell in July and August prior to the new crop being harvested and processed), the trade demand, i.e., what the world is going to buy, taking into consideration the economic conditions and the anticipated market price, and the Board's recommendation as to whether a reserve should be established or not, and this recommendation shall be fully supported by records, etc. [7 C.F.R. § 981.49.]

4. In determining whether or not a reserve should be imposed, the Secretary is to consider the same factors that the Board considered in making that recommendation [7 C.F.R. § 981.47], and, the Administrative Procedures Act requires the Secretary to take into consideration other factors, based upon the comments received in response to the proposed rule. [APA, 5 U.S.C. § 552, et seq.]

5. Once a reserve has been imposed, "no handler shall handle almonds except in accordance with the terms and conditions of this part" [7 C.F.R. § 981.45], and "no handler shall handle almonds except on condition that he comply with the requirements in respect to withholding reserve almonds and the prescribed disposition thereof." [7 C.F.R. § 981.46.]

6. If the Almond Board later decides that the quantity of salable almonds is not sufficient to satisfy the trade demand and

the desirable carry-over for the upcoming crop year, the Almond Board shall meet, but it must be prior to May 15, of the following year, and make a recommendation to the Secretary, who then can increase the salable percentage. [7 C.F.R. § 981.48.]

7. When a reserve has been imposed by the Secretary, the handler is holding those almonds, in California, under the handler's control, but for the account of the Almond Board. [7 C.F.R. § 981.52.] A handler must withhold from handling the quantity of almonds which is the handler's reserve obligation (based upon a percentage of the number of kernelweight pounds the handler received for that crop year), and that if a handler violates the provisions of the reserve, it is deemed a violation of the handler's "quota fixed by the Secretary within the meaning of § 8a(5) of the Act." [7 C.F.R. § 981.50.] The Agricultural Marketing Agreement Act provides that if a handler violates his "quota," he shall forfeit to the United States, in a suit brought by the United States against the handler, the market value of the product deemed the handler's quota for which there is a violation. [7 U.S.C. § 608a(5).]

8. In addition to a forfeiture of the market value of said almonds, there are civil and criminal penalties attached for violations of the marketing orders [7 U.S.C. § 608c(14)(A)], and a handler can be fined up to $1,000.00 per day for each day that said violation continues. [7 U.S.C. § 608c(14)(B).]

9. When a reserve is imposed, the handler can get credit for the reserve in one of two ways: First, he simply delivers those entire reserve almonds to the Almond Board [7 C.F.R. § 981.51], who then sells or disposes of those reserve almonds into charitable institutions, almond oil, almond butter, poultry or animal feed, "or into other channels which the Board finds are

non-competitive with existing normal markets for almonds, and with proper safeguards in each case to prevent such almonds thereafter entering the channels of trade in such normal markets." [7 C.F.R. § 981.66.] The second way a handler may receive credit for his reserve obligation is to sign an Agency Agreement pursuant to 7 C.F.R. § 981.67, and abide completely with the terms of that Agency Agreement, wherein the handler is only acting as an agent of the Almond Board, who is deemed the principal. [7 C.F.R. § 981.67.]

10. The Agency Agreement itself states that when a handler signs the Agency Agreement he agrees to all the rules and regulations in the Agency Agreement, and he is merely requesting authority to act as an agent of the Board in the disposition of reserve almonds. [Agency Agreements, Exhibits "9" through "13".]

11. The Judicial Officer, the person in authority for USDA, has declared the reserve and the Agency Agreement legally provides for the following:

> "Since the Order (promulgated on the basis of a formal rulemaking record, which is not challenged as to this issue), *gives the Board the full power and authority to sell or dispose of all reserve almonds, subject only to the conditions of the Order, and the Secretary's right to disapprove, it does not matter whether a handler is economically compelled to enter into an Agency Agreement. Whether or not there is an Agency Agreement, the Board has complete power as to all reserve almonds. The Board*

must comply with the express provisions of the Order, and it is subject to the power of the Secretary to veto any Board action. But the Board does not have to seek handler approval or concurrence with respect to anything relating to the disposition of reserve almonds. To the purposes of this proceeding, the hearing record supporting the Board's plenary authority as to reserve almonds is not challenged. Whether it was wise to give the Board complete authority to dispose of the reserve almonds as it sees fit, subject only to the conditions set forth in the Order, and the Secretary's veto authority, is not open to question in this administrative review proceeding. Wisely, or unwisely, under the Order, handlers have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds and, therefore, it is enough that the Secretary approve the minimum prices and assessments determined by the Board for the program for almond butter and school lunches, without seeking the advice and consent of handlers, or promulgating the Board's determination through APA rulemaking." [Judicial Officer Decision, Exhibit "1," pgs. 114-115; *SOAP, Cal-Almond and Carlson Farms v. USDA*, AMA Docket No. F&V 981-4.]

12. The Almond Marketing Order requires that handlers hold in their possession or under their control "in proper storage

for the account of the Board," the quantity of almonds necessary to meet [the handler's] reserve obligation [less any amounts disposed of into exempt, non-competitive outlets, as listed in § 981.66 and the Agency Agreement]. [7 C.F.R. § 981.52.]

13. The Judicial Officer for the Secretary of Agriculture has determined that this provision requires that handlers can only hold reserve quantities in the State of California. [Judicial Officer's Opinion, Exhibit "2", *Cal-Almond, Inc., Gourmet Nut Company and Gold Hills Nut Company v. USDA*, 89 AMA Docket No. F&V 981-5, pg. 32-35.]

14. If a handler signs an Agency Agreement, but either violates the terms of the Agency Agreement or does not dispose of the reserve almonds by September 1 (14 months after the crop year began), the handler is obligated to forthwith provide any reserve almonds to the Almond Board, who is then to dispose of those reserve almonds pursuant to § 981.66. [7 C.F.R. § 981.66; § 981.67.] If a handler disposes of reserve almonds pursuant to an Agency Agreement, but the disposition of the reserve almonds is not in compliance with the Agency Agreement, e.g., if the handler sells to an "almond butter manufacturer" but it turns out that the person is not manufacturing almond butter, or if the person is not buying the almonds at the very least the minimum price, the handler loses credit for that disposition of the reserve almonds, and must forfeit free tonnage (almonds that are otherwise fully salable into competitive, open markets), in an amount equal to the amount that was not "properly" disposed of. [7 C.F.R. § 981.66; § 981.67; Declarations of Cloyd Angle (Exhibit "5"); Robert Saulsbury (Exhibit "6"); Exhibits "14" and "15".]

15. If a handler either does not sign an Agency Agreement,

does not dispose of the reserve by September 1 (unless that reserve disposition deadline has been extended by the Secretary), or violates the Agency Agreement, the Almond Board has the "power and authority to sell or dispose of any and all reserve almonds," and deduct the expenses and charges from the net proceeds of those almonds, and distribute those net proceeds to the handler. [7 C.F.R. § 981.66.] In assisting the Almond Board in disposing of said reserve almonds, the Almond Board can use other handlers to dispose of said reserve almonds, and the forfeiting handler has absolutely no control over the amount of expenses charged by the Almond Board, or that third party handler, and has no control over where those almonds are disposed. [7 C.F.R. § 981.66; Declaration of Cloyd Angle (Exhibit "5"); Declaration of Robert Saulsbury (Exhibit "6").]

B. Specific Reserves Imposed And Their Impact Upon Plaintiffs

16. For the 1982-1983 crop year, the Secretary imposed a 2% reserve, requiring all handlers to dispose of said 2% into these non-competitive, low-value outlets, or give the almonds to the Almond Board who would then dispose of those. [Exhibit "9", the 1982-1983 Agency Agreement; Declaration of Cloyd Angle (Exhibit "5"); Declaration of Robert Saulsbury (Exhibit "6").]

17. For the 1982-1983 crop year, Cal-Almond handled 3,354,955 pounds of almonds; the 2% reserve amounted to 67,099 pounds. [Declaration of Cloyd Angle, Exhibit "5", ¶ 4.] For that same year, SOAP handled 9,954,066 pounds of almonds, and the 2% reserve amounted to 198,621 pounds of almonds. [Declaration of Robert Saulsbury, Exhibit "6", ¶ 6.] Neither Cal-Almond nor SOAP could find a legitimate outlet for almond

butter, and they were forced into disposing of said reserve almonds into cattle feed, yielding between 3¢ and 10¢ per pound, when the market price that Cal-Almond and SOAP could receive for said almonds in the open market ranged between $1.18 per pound and $1.36 per pound. [Declaration of Cloyd Angle, Exhibit "5", ¶ 4; Declaration of Robert Saulsbury, Exhibit "6", ¶ 6.]

18. For the 1983-1984 crop year, the Secretary imposed a 3% reserve, which caused Cal-Almond to dump into cattle feed at 5¢ to 10¢ per pound, 98,231 pounds of almonds [Declaration of Cloyd Angle, Exhibit "5", ¶ 5], and forced SOAP to dump into cattle feed at 3¢ to 5¢ per pound, 67,858 pounds of almonds, and forced SOAP to dump into almond butter, 135,000 pounds of almonds at 50¢ per pound [Declaration of Saulsbury, Exhibit "6", ¶ 6] wherein the market price for said almonds during that crop year ranged between $1.32 per pound and $1.76 per pound, and primarily in a range of $1.70 per pound. [Declaration of Angle, Exhibit "5", ¶ 5; Declaration of Saulsbury, Exhibit "6", ¶ 6.] In addition, a 10¢ per pound special assessment was imposed for all reserve almonds, purportedly to advertise almond butter, that cost SOAP an additional $20,285.80 [Declaration of Saulsbury, Exhibit "6", ¶ 6], and cost Cal-Almond an additional $9,823.10 [Declaration of Angle, Exhibit "5", ¶ 5]. [See also the 1983-1984 Agency Agreement, Exhibit "10".]

19. For the 1984-1985 crop year, the Secretary originally imposed a reserve of 25%, and 20% was later released, forcing Cal-Almond and SOAP to dump 5% into these exempt, non-competitive, low-value, outlets. For that crop year, SOAP handled 17,148,081 pounds of almonds, and the 5% reserve amounted to 857,404 pounds; SOAP could only find a legitimate manufacturer of almond butter for only 500 pounds of almonds

(which cost SOAP an extra $50.00 in the 10¢ per pound assessments for almond butter), and the remaining tonnage, 856,906 pounds, was dumped into cattle feed at 3¢ to 5¢ per pound, when the average price for marketable tonnage for that entire crop year ranged between $1.22 per pound and $1.27 per pound. [Declaration of Saulsbury, Exhibit "6", ¶ 7.] For the same crop year, Cal-Almond handled 6,689,242 pounds of almonds; Cal-Almonds 5% reserve amounted to 334,462 pounds of almonds, and Cal-Almond dumped the majority of it into cattle feed at 5¢ to 10¢ per pound, when the market prices was between $1.22 per pound and $1.27 per pound for salable almonds. [Declaration of Angle, Exhibit "5", ¶ 6.] [See also the Agency Agreement for the 1984-1985 crop year, Exhibit "11".]

20. For the 1985-1986 crop year, the Secretary imposed a 20% reserve, and 10% was later released. The other 10% had to be dumped into cattle feed, almond oil, or almond butter. The 10% reserve amounted to 619,754 pounds for Cal-Almond, Inc., the majority of which was dumped into cattle feed at 5¢ per pound, when the market value of said almonds for freely salable tonnage ranged between $1.01 per pound in August, $1.30 per pound in January (1986), $1.50 in March, $1.05 in April, and then $1.84 in May. [Declaration of Angle, Exhibit "5", ¶ 7.] The 1985-1986 crop reserve to SOAP amounted to 905,354 pounds, since SOAP received 9,053,540 pounds. The entire amount of the reserve was shipped by SOAP into cattle feed at 3¢ to 5¢ per pound, and the market value was the same as stated above. Neither SOAP nor Cal-Almond could find legitimate purchasers of almond butter, and thus they were forced to sell the almonds into cattle feed. [Declaration of Saulsbury, Exhibit "6", ¶ 8; Declaration of Angle, Exhibit "5", ¶ 7; Agency Agreement for 1985-1986 crop year, Exhibit "12".]

Appendix K

21. In 1985-1986, the Almond Board conducted an audit of five, out of many, foreign buyers of "almond butter," and found that 2 out of the 5 were not manufacturing almond butter, but neither the Almond Board nor USDA went after the sellers of that product to order them to forfeit free tonnage for the amounts shipped, because the primary shipper was Blue Diamond, the controlling entity in the almond industry. [Exhibit "14", Almond Board almond butter audit; Exhibit "15", USDA's Compliance Report re said audit (Allegation 3B); Declaration of Saulsbury, Exhibit "6", ¶ 10.]

22. On July 30, 1986, the Almond Board met, and Blue Diamond, because they had over 4 million pounds of almonds left over from the reserve requirement, they sought to take advantage of the extremely short crop year in 1986 in order to dispose of their reserve almonds when the price per pound raised dramatically to over $2.80 per pound, and they voted to extend the deadline to dispose of the reserve almonds, which created a huge windfall for Blue Diamond, in excess of $8 Million, and SOAP and Cal-Almond lost an extraordinary amount of money as a result of Blue Diamond being able to manipulate the deadline for disposing of reserve almonds. [Declaration of Saulsbury, Exhibit "6", ¶ 10; Declaration of Angle, Exhibit "5", ¶ 7; Exhibit "16", the amount of reserve tonnage held by Blue Diamond when they took the vote on June 30, 1986, prepared by the Almond Board; Exhibit "17", Report of USDA Official attending the July 30, 1986 meeting, reporting that Blue Diamond wanted to take advantage of the escalating prices (CAGE, being the California Almond Growers Exchange, which is the same entity as Blue Diamond, they having changed their name in approximately 1989-1990.]

23. For the 1988-1989 crop year, the Secretary imposed a

25% reserve. The Secretary ordered it all held pending his final determination as to whether or not reserve would be released into fully salable channels. The Secretary later ordered a release of the reserve on August 1, 1989, a month-and-a-half after the new crop year began. The 25% reserve amounted to 402,408 pounds for SOAP, based upon their receipt of 1,609,632 pounds, and amounted to 317,410 pounds of reserve almonds for Gold Hills, who received 1,268,000 of almonds for that crop year. [Declaration of Saulsbury, Exhibit "6", ¶ 9; Declaration of Phipps, Exhibit "7", ¶ 2.]

24. SOAP and Gold Hills Nut Company had to spend an extraordinary amount of money (in excess of 17¢ per pound) just storing the reserves for the Secretary; these storage costs included extra fumigations, extra labor, extra insurance, extra finance charges to the bank, shrinkage of the product (due to moisture loss as a result of having to hold it so long), and overhead; thus the cost to SOAP for storing those reserve almonds was at least $72,433.44; and the cost to Gold Hills Nut Company was at least $54,118.00. [Declaration of Angle, Exhibit "5", ¶¶ 8-9; Declaration of Saulsbury, Exhibit "6", ¶ 9; Declaration of Phipps, Exhibit "7", ¶¶ 2-8.]

25. Any time a reserve is imposed, the Almond Board staff, along with, on occasion, independent auditors hired by the Almond Board, come to the handler's premises to insure that the reserve is properly accounted for, properly shipped, or properly held for the account of the Board, and an audit is conducted of the handler's records. [Declaration of Angle, Exhibit "5", ¶ 11; Declaration of Saulsbury, Exhibit "6", ¶ 13; Declaration of Phipps, Exhibit "7", ¶ 9.] The Almond Marketing Order requires that handlers make their premises available to the Secretary of Agriculture and the Almond Board for inspection, and for an

accounting of the reserve, and requires handlers to provide the Almond Board with various reports, under penalty of perjury, with respect to their records and recordkeeping obligations. [7 C.F.R. §§ 981.70-981.74.]

26. For the 1990-1991 crop year, the Secretary imposed a 35% reserve. The Secretary later released 5% (of the total tonnage handled) on February 7, 1991, released an additional 10% on May 31, 1991, and released 13% on June 28, 1991. Seven percent (7%) of the entire amount handled by handlers had to be disposed of into non-competitive, low-value outlets. The 7% reserve to SOAP amounted to 38,000 pounds. [Declaration of Saulsbury, Exhibit "6", ¶ 11.] To Gold Hills, the 7% reserve amounted to 210,000 pounds of almonds. [Declaration of Phipps, Exhibit "7", ¶ 11.] The market price for fully salable almonds during the 1990-1991 crop year averaged between $1.35 per pound and $1.60 per pound. Instead, the Secretary ordered this 7% forced into cattle feed, almond oil, almond butter, charitable releases, airline snack packs and USDA's school lunch program using almond butter. [Declaration of Angle, Exhibit "5", ¶ 13; Declaration of Saulsbury, Exhibit "6", ¶ 11; Declaration of Phipps, Exhibit "7", ¶ 11.] Of this 7% (43,502,143 pounds), over 8 million pounds went to airline snack packs, over 10 million pounds went to oil and cattle feed, and over 24 million pounds went to almond butter — most of which USDA purchased extremely cheaply for their school lunch programs (approximately 20 million pounds). See Report Of Reserve Shipments published by the Almond Board, Second Supplemental Appendix, Exhibit "27," and USDA's Final Rule re the 1990-1991 reserve, Supplemental Appendix, Exhibit "22."

27. For the 1990-1991 crop year, Plaintiffs Browns Lake

Ranch delivered to Cal-Almond 488,140 pounds of almonds, Plaintiff Mac Enterprises, Inc. delivered to Cal-Almond 859,567 pounds, Plaintiff Van Kay, Inc. delivered 87,111 pounds to Cal-Almond, inc., and Plaintiff Derk Van Konynenburg delivered to Cal-Almond 338,648 pounds of almonds, with these four Plaintiffs being almond growers. [Declaration of Angle, Exhibit "5", ¶ 16; Declaration of Paul McManis, Exhibit "8", ¶ 3.] Plaintiffs Mac Enterprises, Browns Lake Ranch, Van Kay, Inc. and Derk Van Konynenburg spend $2,145.00 per acre per year in cultural costs. The 7% reserve to them amounted to 34,169 pounds to Plaintiff Browns Lake Ranch, 60,175 pounds to Mac Enterprises, 6,097 to Van Kay, Inc., and 23,705 pounds with respect to Derk Van Konynenburg. [Declaration of McManis, Exhibit "8", ¶ 3.]

28. The 7% reserve to the 4 Plaintiff growers, means that those growers cannot get more than 20¢ per pound on their almonds, when the market value for said almonds is between $1.35 per pound and $1.60 per pound, plus the Secretary effectively required the growers to spend the cultural costs on 100% of their production, which effectively meant that the Secretary took 21 acres of the Mac Enterprise ranch, 14 acres of the Browns Lake Ranch property, 13 acres of Derk Van Konynenburg's property, and 4.2 acres of Van Kay, Inc.'s property. [Declaration of McManis, Exhibit "8", ¶ 2.] Since the price the 4 Plaintiff growers could receive on the 7% reserve was between 80¢ and 90¢ per pound less than the market value of said almonds, Plaintiff Browns Lake Ranch lost $27,335.00 in net profit (from the sale of the almond alone), the 7% reserve cost Mac Enterprises $48,140.00 in net profit (just taking into account the difference between what they got for the reserve almonds and what the market price was), the 7% reserve cost Van Kay,Inc. $4,887.00 in net profit (just counting the difference

between the reserve price and the market price for almonds), and it cost Derk Van Konynenburg $18,964.00 in net profits (just counting the difference between the reserve price and the market price for almonds). [Declaration of McManis, Exhibit "8", ¶3.]

29. Added to the lost profits is the forced cultural costs on the "reserve acreage," which amounted to $72,380.00 loss to Browns Lake Ranch ($45,040.00 in cultural costs, plus $27,335.00 in lost net profits); it cost Mac Enterprises $78,170.00 ($30,030.00 in cultural costs plus $48,140.00 in lost net profits); it cost Van Kay, Inc. $13,896.00 ($9,009.00 in cultural costs plus $4,887.00 in lost net profits); and it cost Derk Van Konynenburg $46,849.00 ($27,885.00 in cultural costs and $18,964.00 in lost net profits). [Declaration of McManis, Exhibit "8", ¶3.]

30. The 4 Plaintiff growers spent an exorbitant amount of money in purchasing their acreage (in excess of $6,000.00) and it cost them an additional $8,000.00 per acre in net out-of-pocket costs just to arrive at the point where the almonds had commercial production. [Declaration of McManis, Exhibit "8", ¶1.]

31. In addition, when the Secretary imposed the 35% reserve, the grower Plaintiffs could not receive money on the entire 35% until the Secretary began reducing the reserve. This cost the 4 grower Plaintiffs substantial amounts of money in extra interest costs to the bank, and also made it extremely difficult in getting cultural cost financing for the following year, because the cultural cost lenders are afraid to loan money on 100% of the anticipated tonnage because they do not know whether the Secretary of Agriculture is going to impose a reserve and force the almonds dumped into non-competitive, low-value

outlets. [Declaration of McManis, Exhibit "8", ¶¶ 2-3; Declaration of Angle, Exhibit "5", ¶ 16.]

32. When a reserve is imposed by the Secretary of Agriculture, the handlers feel economically coerced into signing the Agency Agreement because if they do not sign an Agency Agreement, the almond must be turned over to the Almond Board who then will hire some other handler to store, process and dispose of those almonds; the handler Plaintiffs have no control over those costs, and the handler Plaintiffs have no control over the outlets to which the almonds are sold. [Declaration of Angle, Exhibit "5", ¶ 11; Declaration of Saulsbury, Exhibit "6", ¶¶ 12-14.]

33. When SOAP and Cal-Almond go out in the field to sign up growers for the upcoming crop year, the Almond Board is months away from meeting to determine whether of not a reserve will be recommended, and SOAP and Cal-Almond attempt to purchase the approximate number of pounds that they can reasonably, efficiently and expeditiously market for that particular crop year, and so as to satisfy their buyer demands; SOAP and Cal-Almond do not want buyers going to some other handler to purchase almonds, so they attempt to sign up the number of pounds that they need to market that year. When a reserve is imposed, SOAP and Cal-Almond do not have enough almonds to market to their buyers' demands, and have to go out in the open market to purchase almonds, at the then-going market price, which means they make no money on those particular almonds. [Declaration of Angle, Exhibit "5", ¶ 3; Declaration of Saulsbury, Exhibit "6", ¶ 2.]

34. Blue Diamond, who has controlled 6 seats on the 10-member Almond Board in 37 out of the last 41 years, oftentimes

desires a reserve, because with the amount of tonnage they handle, they cannot possibly market all of their tonnage, so imposing a reserve on themselves is never a handicap to them, only a handicap to Plaintiffs, and other small-to-medium size handlers. [Declaration of Angle, Exhibit "5", ¶¶ 10-12, 14; Declaration of Saulsbury Exhibit "6", ¶¶ 2, 10-12.]

35. Cal-Almond has invested over $7.5 Million into its processing plant, and SOAP has invested over $10 Million into its processing plant. [Declaration of Angle, Exhibit "5", ¶ 3; Declaration of Saulsbury, Exhibit "6", ¶¶ 2-4.]

36. When Cal-Almond, SOAP and Gold Hills got into the almond processing business, they assumed the Secretary would only impose a reserve if there had been an economic study done and economic justification for said reserve, and only if it increased returns. [Declaration of Angle, Exhibit "5", ¶¶ 8, 10-15, 19-20; Declaration of Saulsbury, Exhibit "6", ¶¶ 12-13; Declaration of Phipps, Exhibit "7", ¶ 14.]

37. Imposing a reserve by the Secretary of Agriculture has never increased the grower returns (in total revenue per acre), has cost the growers substantial sums of money, and has cost Plaintiffs substantial amounts of money. When a reserve is imposed, not only are the handlers forced to dump this product into non-competitive outlets which yield no return either to growers or to processors, the processors, like the 3 handler Plaintiffs in this case, must spend in excess of 10¢ per pound just in receiving the almonds, the labor involved, the inspection costs, the storage costs and the shipping costs. [Declaration of Angle, Exhibit "5", ¶¶ 8, 10-15, 19-20; Declaration of Saulsbury, Exhibit "6"; Declaration of Phipps, Exhibit "7".]

38. Blue Diamond controls the industry, controls the voting majority on the Almond Board, and controls when a reserve is imposed and not imposed. [Declarations of Angle, Saulsbury and Phipps, Exhibits "5", "6" and "7".]

39. When the Secretary imposes a reserve, the 3 handler Plaintiffs now realize, as a result of the Judicial Officer's Decision [Exhibit "1"], that it is the Secretary and the Almond Board that become the owner and have title to those reserve almonds, and that the property is expropriated from the Plaintiffs. [Declarations of Angle, Saulsbury and Phipps, Exhibits "5", "6" and "7"; see also the Almond Marketing Order.]

40. When the Secretary imposes a reserve, if a handler wishes to challenge that reserve obligation, or any Almond Marketing Order regulation, the handler must exhaust administrative remedies by filing a petition with the Secretary of Agriculture and challenging the regulations therein, before the handler has the opportunity to go to the District Court and challenge the regulation there. The Judicial Officer, who speaks for the Secretary of Agriculture, in his judicial capacity, refuses to provide injunctive or interim relief with respect to any reserve obligation, the handler is required to comply with the law or face substantial criminal and civil penalties, and the Agricultural Marketing Agreement Act does not provide any monetary damages or consequential damage remedies nor any just compensation in the event a handler prevails in the District Court or before the Secretary of Agriculture. [See Declaration of Brian C. Leighton, Exhibit "4".]

41. Plaintiffs Cal-Almond, Gold Hills Nut Company, and Saulsbury have attempted to enjoin the Secretarial action with

respect to the reserve and some of the other Almond Board obligations, the U.S. District Court has refused to intervene in that matter, and the Secretary of Agriculture refuses to provide injunctive relief, but instead mandates that the handlers comply with the obligations. [See Declaration of Leighton, Exhibit "4".]

APPENDIX L — LETTER ADDRESSED TO FRAZIER NUT FARMS DATED FEBRUARY 2, 1993

ALMOND BOARD OF CALIFORNIA
Post Office Box 15920
Sacramento, California 95852
(916) 338-2225, FAX (916) 338-1019

February 2, 1993

Mr. Jim Frazier
Frazier Nut Farms, Inc.
10830 Yosemite Boulevard
Waterford, CA 95386

Dear Jim:

Our records indicate that your company has failed to completely satisfy its 1990-91 crop year reserve obligation. Enclosed is the final recap showing your remaining obligation. Section 981.66(e) of the Almond Marketing Order requires that the Board dispose of any handler's reserve obligation remaining at the end of the program. The date for final documentation was December 1, 1992.

Therefore we must make arrangements to dispose of your remaining obligation. To assist in scheduling please answer the following questions, sign and return to the Almond Board not later than February 15, 1993.

1. Will you be delivering product to the Board?

2. Approximate total gross weight of product?

3. Approximate net kernel weight?

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4. Approximate edible percentage?

5. Type of container? i.e., fiber bin, 50# box, bulk, etc. . . .

Signature _____

Date _____

We will be contacting you soon to schedule a date to pick up the product. As the handler you will be responsible for arranging an inspection at time of shipment. NOTE: Failure to comply with this request will be considered a willful violation and referred to the USDA as such.

Sincerely,

s/ Merle Jacobs
Merle Jacobs

MJ:scs
enclosure

APPENDIX M — AGENCY AGREEMENT DATED JUNE 15, 1991

OMB Approval #0581-0071
Expiration Date: 6/30/93
ABC Form 12
(Revised 1/91)

1990-91
AGENCY AGREEMENT – DISPOSITION OF RESERVE TO NONCOMPETITIVE OUTLETS

THIS AGREEMENT, made this *15th* day of *June*, 19*91*, between the Almond Board of California, hereinafter referred to as "Board," and *Cal-Almond, Inc.* a handler of almonds, hereinafter referred to as "Agent," WITNESSETH that:

WHEREAS, § 981.66 of the Order of the Secretary of Agriculture regulating the handling of almonds grown in California, hereinafter referred to as the "Order," authorizes the Board to dispose of reserve almonds in noncompetitive outlets; and

WHEREAS, § 981.67 of the Order permits handlers of almonds to become agents of the Board in such disposal; and

WHEREAS, Agent as a handler of almonds is subject to the provisions of the Order and has requested authority to act as agent of the Board in the disposition of reserve almonds; and

WHEREAS, timely information on Agent's intentions to dispose and dispositions of almonds into noncompetitive outlets is necessary for effective administration of the reserve and for future marketing policy determination of the Board;

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NOW THEREFORE IT IS AGREED BY AND BETWEEN the parties as follows:

1. *General*

(a) Subject to the provisions of § 981.66 of the Order and the regulations applicable to the crop year, Agent is hereby authorized on behalf of the Board to dispose of reserve almonds held or acquired by Agent and which are subject to the Board's disposal authority. Such disposition shall conform with such inspection, certification, and other disposition terms and conditions as the Board may herein prescribe or from time to time specify, and shall be subject to the limitations placed on the Board's disposal authority for the crop year.

(b) Agent agrees that there shall be no obligation on the part of the Board with respect to any expenses, commitments, or damages arising out of any agreement between Agent and any other person relative to the disposition of reserve almonds or of saleable almonds for which credit against a reserve obligation is desired.

(c) Board agrees that if at any time the dispositions by Agent exceed agent's reserve obligation and the excess must be classified as saleable, a portion or all of such excess may be credited as reserve to cover an increase in Agent's reserve obligation or a transfer to another handler but only if the disposition of such saleable tonnage has complied with the requirements for reserve disposition.

(d) Agent agrees that no reserve almonds will be sold or delivered to any outlets or geographic locations where

Board representatives or Federal-State Inspection Service would be restricted, for any reason, from verifying reserve almonds, products made from reserve almonds or records pertaining to reserve dispositions.

2. *Geographic Limitations/Other Safeguards*

Agent agrees that all reserve almonds shall be disposed of as follows:

(a) Almonds for human consumption as almonds, almond butter, natural almond paste, packets sold to airlines, school lunch programs, etc., shall be manufactured and/or packed in the 48 contiguous states.

(b) Almonds used in the manufacture of almond oil shall be crushed only in the 48 contiguous states. Sale of such almonds shall be direct from agent to oil manufacturer.

(c) Almonds for poultry or animal feed shall be sold only to feed manufacturers or commercial feed distributors licensed by CDFA, Feed and Fertilizer and Livestock Branch and currently hold valid licenses. Such almonds shall be ground under the direct supervision of the Almond Board at Board's option.

(d) Almond packets sold to airlines for complimentary use, and almonds sold to school lunch and other governmental uses, and to charitable institutions for charitable purposes shall be sold for use in the United States, except that airline packets may be distributed to international carriers. This provision does not apply to donations for use in Operation Desert Shield/Storm.

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3. *Eligible Outlets*

(a) *School Lunch and other Governmental Uses*

The Almond Board has requested USDA to purchase reserve almonds for use in a school lunch program. Individual handlers may participate on a competitive bid basis if USDA implements this program. In addition, handlers may work with local school districts, colleges, and universities to promote the sale of reserve almonds in the school lunch program at State and National levels. Minimum prices and inspection criteria are as specified herein.

(b) *Complimentary Snack Packs*

This Reserve category is for sales of almonds to be used for airline complimentary snack packs given free of charge in conjunction with food and beverage service. The packs shall be one ounce or less and shall carry the airline logo and/or the handler's brand or the airline logo and the repackager's brand. The words "not for resale" shall be printed boldly on each packet. Minimum prices and inspection criteria are as specified herein.

(c) *Natural Almond Paste*

For sale and distribution in the *U.S. Market only,* handlers may now use, or sell for use, *unblanched* almonds, U.S. No. 1 pieces or better, for manufacture of natural (unblanched) almond paste. Requirements for this reserve category are as follows:

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(1) Natural almond paste must contain a minimum of 30 percent unblanched almonds by weight in the solid (dry) components of the paste.

(2) Natural almond paste is hereby defined as "a product made by milling together moisturized unblanched almonds and sugar to produce a pliable, homogenous mass of considerable density to which may be added flavors, and also preservatives to inhibit mold. The finished product may contain no more than 16 percent moisture by weight.

(3) The same inspection and certification requirements apply for Reserve almonds used for natural almond paste as for almond butter, including completing and filing ABC Forms 13 and 14.

(d) *Almond Butter*

Almond butter is defined in § 981.466 as a comminuted food product prepared by grinding shelled or blanched almonds into a homogeneous plastic or semi-plastic mass or liquid having very few particles larger than 1/16 inch in any dimension. To produce chunky style almond butter, almond chunks or pieces may be added up to a maximum of 25 percent by weight of the finished product. The size of the almond pieces used to make chunky style almond butter may not exceed 5/16 inch in any dimension.

(e) *Charitable Institutions for Charitable Purposes*

Eligible organizations are as described in the cumulative list of organizations described in § 170(c) of the Internal Revenue Service code.

(f) *Donations for Operation Desert Shield/Storm*

Containers of almonds 50 pounds net or less, Select Sheller Run grade or better, may be donated to the United States military services for use in Operation Desert Shield/Storm or donated to charitable organizations for the same purpose. The words "not for resale" shall be printed on each container.

(g) *Other Approved Reserve Outlets*

As specified in § 981.66, additional noncompetitive outlets may be added by the Board as developed.

4. *Grade Requirements*

(a) Reserve almonds used for human consumption purposes as almonds, almond butter, natural almond paste, etc. shall be (1) U.S. No. 1 pieces or better as defined in U.S. Standards for Grades for shelled almonds (7 C.F.R. 51.2105 - 51.2132), or (2) any manufactured item so certified by the Federal-State Inspection Service as follows; provided that almonds coated with honey, candy, yogurt, or similar coatings shall be certified prior to coating:

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BASIC REQUIREMENT

(1) Shall not contain serious damage by decay, rancidity, insect injury, or mold.

(2) Shall not contain foreign material.

(3) Blanched whole almonds and pieces of almonds shall not be damaged by adhering skin. Whole almonds shall be damaged when pellicle is adhering to an area more than 1/4 inch in the aggregate and pieces shall be damaged when pellicle is adhering to an area of more than 10 percent of the total surface area of the piece.

(4) Shall be well dried and clean meaning kernels shall be firm and brittle, not pliable or leathery, and shall be practically free from dirt or other foreign substances exclusive of salt, flavorings or other such additives.

(5) Shall be free from the following other defects:

(A) Gum, when a film of shiny resinous-appearing substance covers more than 1/8 of the surface of the kernel;

(B) Shriveling, when a kernel is excessively thin for its size or when materially withered, shrunken, leathery, tough or only partially developed, provided that partially developed kernels are not considered defects if more than 3/4 of the pellicle is filled with meat;

(C) Brown spot on the kernel, either single or

multiple, when the affected area aggregates more than a circle 1/8 inch in diameter.

(6) Minimum size shall be 8/64 inch in diameter.

TOLERANCES

(1) 3 percent for serious damage by decay, rancidity, insect injury, or mold.

(2) 0.3 percent for foreign material.

(3) 3 percent for adhering skin.

(4) 2 percent for kernels or pieces which are not well dried, not clean or are affected by other defects.

(5) 5 percent for undersize kernels or pieces.

(b) Reserve almonds used for almond oil or poultry or animal feed shall receive credit for only the percent of edible kernels contained in the delivery subject to minimum edible kernel content provided for in § 7(a) of this Agreement.

5. *Inspection*

All reserve almonds shall be inspected by the Federal-State Inspection Service at Agent's expense as follows:

(a) Airline packets

Each lot of reserve almonds used to produce packets

shall be inspected, lot stamped and certified according to quality requirements specified in § 4 of this Agreement at handler's premises prior to shipment. This may be either staged lot inspection or in-line inspection.

There may be a difference (shrinkage) between the actual kernel weight of almonds received for manufacture into airline packets and the actual weight of finished product. A loss factor of 6 percent will be allowed.

Agent and repacker shall conform to Federal-State Inspection and certification requirements as follows:

(1) Blanched and Manufactured Almonds – Grading standards have been developed for blanched and manufactured almonds. A handler may use such stock provided they are certified by the Federal-State Inspection Service in accordance with standards specified in § 4(a).

(A) Each shipment shall be accompanied by a copy of the inspection certificate and an ABC Form 13/14.

(B) At location where packets are packed, the Federal or Federal-State inspection Service certify that the almonds were used in airline packets.

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(b) Almond butter and natural almond paste

(1) Raw product

All reserve almonds to be used in the manufacture of almond butter and/or natural almond paste shall be certified as to quality by the Federal-State Inspection Service. This may be either lot inspection or in-line inspection. Almonds from one lot certified as U.S. grade may be delivered in separate lots to one or more manufacturers provided.

(A) Each delivery shall be accompanied by a copy of the inspection certificate and an ABC FORM 13/14.

(B) At manufacturer's premises, the Federal or Federal-State Inspection Service shall certify that the almonds were made into the product so specified.

(2) Blanched and manufactured almonds

Grading standards have been developed for blanched and manufactured almonds which will allow a handler to use manufactured stock already in inventory, providing they are certified by the Federal-State Inspection Service in accordance with the standards as specified in § 4(a).

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(3) Shrinkage factor

There may be a difference (shrinkage) between actual kernel weight of almonds received for manufacture into almond butter or natural paste and the actual weight of finished product. A loss factor of 6 percent will be allowed.

(c) Reserve almonds sold to the government for USDA school lunch programs and for other governmental uses shall meet the inspection criteria set forth in terms of the respective government bid announcement.

(d) Reserve almonds sold to charitable institutions for charitable purposes of donated for use in Operation Desert Shield/Storm shall be certified as to quality by the Federal-State Inspection Service, by either lot or in-line inspection prior to delivery. Each delivery shall be accompanied by an ABC Form 13/14.

(e) Almond oil – see § 7(a) and (b) below.

(f) Livestock and poultry feed – see § 7(a) and (b) below.

(g) Federal or Federal-State Inspection Certification

In order to complete the certification required by paragraphs 5(a)(1)(b) and 5(b)(1)(b) of this Agreement, the Federal or Federal-State Inspection Service must: (1) Visit the packer or manufacturer's facility following receipt of almonds and before processing to verify that the quantity of almonds reported on ABC Form 14 was received, (2) visit the

packer or manufacturer's facility after processing to verify the quantity of finished product which the packer or manufacturer certified on ABC Form 14 was made from the product which the packer or manufacturer certified on ABC Form 14 was made from the product received and observed under 5(g)(1), and (3) issue a certificate to the packer or manufacturer attesting to what was observed under 5(g)(1) and 5(g)(2).

6. *Minimum Prices*

If established by the Secretary, minimum prices will apply to reserve almonds diverted to eligible outlets except for almonds diverted to oil, feed, charities, or for use in Operation Desert Shield/Storm. Agents will be notified of any such minimum price schedule established.

7. *Dual Credit* (Reserve and inedibles)

(a) A lot of reserve almonds delivered to nonhuman consumption outlets must contain a minimum of 20 percent edible kernels in order to receive credit against a reserve obligation. Each handler shall cause to be determined through the Federal-State Inspection Service, and at handler expense, the percentage of edible and inedible kernels in each lot at the time of disposition. Such inspected and certified lots will permit a handler to apply to the Board for full credit against his reserve obligation for the amount of edible kernels contained in each such lot provided it meets the 20 percent minimum edible kernel content as

specified, and credit against handler's inedible obligation for all certified amounts of inedible kernels contained in each lot, provided it has at least 10 percent inedible kernels. If, subsequent to delivery for reserve credit to nonhuman consumption outlets, reserve percentages are reduced, handler has the option to apply any excess reserve credit to his inedible obligation.

Examples: All for shipment for nonhuman consumption outlets;

(1) A lot containing 20 percent edible kernels or more and up to 80 percent but not less than 10 percent inedible kernels is eligible to receive both reserve and inedible disposition credit according to the percentages in each outlet.

(2) A lot containing 20 percent edible kernels and 9 percent inedible kernels — 29 percent total meats — is eligible to receive reserve credit for the 20 percent edible meats and no edible credit, or, at his option, a handler may receive inedible disposition credit of the 29 percent total meats when disposed of in a nonhuman consumption outlet.

(3) A lot containing 19 percent edible kernels and 20 percent inedible kernels — 39 percent total meats — is eligible to receive inedible disposition credit for the 39 percent meat content and no reserve credit.

(b) All almonds shall be inspected and certified by the inspection agency at time of disposition into an eligible outlet.

8. *Disposition*

Agent may dispose of authorized quantities and qualities of reserve almonds either directly or through another agent following approval by the Board. *All* reserve dispositions made to *nonhuman consumption outlets* pursuant to *§2(b) and (c) and 7(a) and (b)* of this Agreement shall be made, at the Board's option, under direct supervision of the Board. The Board shall be notified by the handler at least 72 hours prior to disposition.

Prior to making any disposition of any reserve almonds, agent shall notify Board of his intentions of dispose of reserve almonds on ABC Form 13.

Any of Agent's reserve almonds remaining unsold on **September 1, 1991,** shall be disposed of by the Board as soon as practicable through the most readily available reserve outlets.

ABC Form 13 shall be accepted as evidence of a reserve sale and Agent, manufacturer or user shall submit supporting documentation with ABC Form 14 on completion of diversion of reserve almonds. Example: For sales or reserve almonds for manufacture of almond butter, manufacturer will be required to complete processing of the reserve almonds into butter so that the handler may file ABC Form 14.

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9. *Credit for Reserve Disposition*

(a) Agent will be credited with disposition in reserve outlets on compliance with any minimum prices as recommended by the Board and established by the Secretary of Agriculture and on filing with the Board an executed ABC Form 14, completion of disposition of reserve almonds, together with supporting documentation as follows:

- For shipment to authorized noncompetitive outlets — the inspection certificate(s) on the almonds shipped.

- For conversion to an authorized noncompetitive product — the inspection certificate(s) on the almonds diverted. If agent did not do the converting, the ABC Form 14 shall be supported also by a manufacturers certification and a Federal or Federal-State Inspection Service certification.

(b) Shipments to charitable and/or educational outlets under the provisions of § 981.441 will not be eligible for reserve credit.

10. Agent, by signing this Agreement, certifies that:

(a) When almonds are to be used for almond butter, natural almond paste, school lunch or other governmental uses, airline packets or other applicable noncompetitive outlets, he will comply with any minimum prices of almonds recommended by the Board and established by the Secretary; and

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11. The Agency herein shall apply to the 1990-91 crop year reserve almonds disposed of by handlers beginning on July 1, 1990, and shall remain in effect until September 1, 1991, or such later date as the Secretry of Agriculture may establish pursuant to § 981.66(e) of the order; provided, that Agent may terminate this agency agreement as of April 1, 1991, by written notice given on or before March 20, 1991.

IN WITNESS WHEREOF, Agent has subscribed his name through an authorized person and, if a corporation, has subscribed its corporate name and affixed its corporate seal, and the Board has subscribed its name through its duly authorized Manager.

June 15, 1991
Date

Cal-Almond, Inc.
Agent

By s/ illegible

President
Title

THIS AGENCY AGREEMENT IS SIGNED UNDER PROTEST AND IT IS UNDERSTOOD THAT IT WILL NOT BE BINDING UPON HANDLER IN THE EVENT THAT ANY FINAL DECISION FROM A COURT OF COMPETENT JURISDICTION DECLARES THAT RESERVE AND/OR THE AGENCY AGREEMENT OR ANY TERMS CONTAINED THEREIN TO BE INVALID.

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ALMOND BOARD OF CALIFORNIA

_____

Manager

In response to the Paperwork Reduction Act, OMB clearance has been granted for this form. OMB requires that the following statement be shown on ABC Form 12: "No handler shall dispose of reserve almonds to noncompetitive outlets as an agent of the Board unless a completed agency agreement is received (7 U.S.C. 508(d), 7 C.F.R. 981.66, 7 C.F.R. 981.57 and 7 C.F.R. 981.487)"

Public reporting burden for this collection of information is estimated to average ten minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing this burden to Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, D.C. 20250; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington D.C. 20503.

APPENDIX N — RELEVANT STATUTES AND REGULATIONS

7 U.S.C. § 601

Sec. 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

Sec. 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and

feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title [FN1] such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order

has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

Sec. 608a. Enforcement of chapter

(5) Forfeitures

Any person exceeding any quota or allotment fixed for him under this chapter by the Secretary of Agriculture and any other person knowingly participating or aiding in the exceeding of such quota or allotment shall forfeit to the United States a sum equal to the value of such excess at the current market price for such commodity at the time of violation, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

Sec. 608c. Orders regulating handling of commodity

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order:

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Provided, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocadoes, apples, raisins, walnuts, tomatoes, or Florida grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit mayprovide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as maybe authorized by the order . . . * * *.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified insubsection (2) of this section orders shall contain one or more of the following terms andconditions:

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the UnitedStates. . . . * * *.

(14) Violation of order; penalty

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to subsection (15) of this

section was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this subsection for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to subsection (15) of this section. The Secretary may issue an order assessing a civil penalty under this subsection only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such

ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

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7 C.F.R. § 981.45

Sec. 981.45 General.

In order to effectuate the declared policy of the act, no handler shall handle almonds except in accordance with the terms and conditions of this part.

Sec. 981.46 Withholding reserve.

When a reserve percentage has been fixed for any crop year, as hereinafter provided, no handler shall handle almonds except on condition that he comply with the requirements in respect to withholding reserve almonds and the prescribed disposition thereof.

Sec. 981.47 Method of establishing salable and reserve percentages.

Whenever the Secretary finds, from the recommendations and supporting information supplied by the Board or from any other available information, that to designate the percentages of almonds during any crop year which shall be salable almonds and reserve almonds would tend to effectuate the declared policy of the act, he shall designate such percentages. Except as provided in Sec. 981.50 the salable and reserve percentages shall each be applied to the kernel weight of almonds received by a handler for his own account during the crop year. In establishing such salable and reserve percentages, the Secretary shall give consideration to the ratio of estimated trade demand (either domestic or domestic plus export, less the handler carryover available to satisfy trade demand plus the desirable handler carryover at the end of the crop year) to the estimated production

of marketable almonds (all expressed in terms of kernel weight) or the allocation quantity (marketable production plus almonds diverted to oil or feed when eligible for reserve satisfaction) whichever is applicable; the recommendation submitted to him by the Board; and such other information as he deems appropriate. The total of the salable and reserve percentages established each crop year shall equal 100 percent.

Sec. 981.48 Increase of salable percentage.

Upon request filed prior to May 15 by the Board or, if the Board should fail to request, by two or more handlers who have handled at least 15 percent of all almonds handled in the preceding crop year, and after findings of fact (based upon a revision of the estimates required under Sec. 981.49 and other pertinent information) that the quantity of salable almonds is not sufficient to satisfy trade demand and desirable carryover requirements for the crop year, the Secretary may increase the salable percentage. Such findings shall be made in the manner specified in Sec. 981.47.

Sec. 981.49 Board estimates and recommendations.

To aid the Secretary in fixing the salable and reserve percentages, the Board shall furnish to the Secretary, not later than August 1, the following estimates (kernel weight basis) and recommendations for the crop year, each of which, or any later revisions thereof, shall be adopted by the affirmative vote of at least six members:

(a) The quantity of marketable almonds to be produced;

(b) The handler carryover and the reserve inventory as of July 1;

(c) The desirable handler carryover and the probable reserve inventory at the end of the crop year;

(d) The trade demand, taking into consideration anticipated imports, economic conditions and the anticipated market price (within the limitations of the act);

(e) The recommended salable and reserve percentages to be established; and

(f) The recommended percentage of reserve almonds that may be exported pursuant to Sec. 981.66.

The Board shall also furnish to the Secretary a complete report of the proceedings of the Board meeting at which the recommended salable and reserve percentages were considered. If, for any reason, the Board fails to make these estimates or to recommend to the Secretary salable and reserve percentages as required hereby, reports representing the views of members with respect to such matters may be submitted to the Secretary who may act on the basis of such reports or other information available to him.

Sec. 981.50 Reserve obligation.

Whenever salable and reserve percentages are in effect for a crop year, each handler shall withhold from handling a quantity of almonds having a kernel weight equal to the reserve percentage of the kernel weight of all almonds such handler receives for his own account during the crop year: Provided, That, any quantity of almonds delivered to outlets such as poultry or animal feed or crushing into oil, in a manner permitting accountability to the Board, shall not be included in such receipts. The quantity of almonds hereby required to be

withheld from handling shall constitute, and may be referred to as the "reserve" or "reserve obligation" of a handler. The almonds handled as salable almonds by any handler, in accordance with the provisions of this part, shall be deemed to be that handler's quota fixed by athe Secretary within the meaning of section 8a(5) of the act.

Sec. 981.51 Requirements for reserve.

Each handler may satisfy his reserve obligation with such almonds specified in the terms of the agency agreement authorized in Sec. 981.67, including all applicable inspection and certification requirements. Any handler who does not become an agent may receive credit by similarly delivering almonds to the Board or its designees. These requirements may be established by the Board, with the approval of the Secretary, and from time to time so modified, and may include grade requirements for reserve almonds delivered to human consumption outlets.

Sec. 981.52 Holding requirement and delivery.

Each handler shall, at all times, hold in his possession or under his control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation less: (a) Any quantity which was disposed of by him pursuant to Sec. 981.67; and (b) any quantity for which he is otherwise relieved by the Board of responsibility to so hold almonds. Upon demand of the Board reserve almonds shall be delivered to the Board f.o.b. handler's warehouse or point of storage, except that the Board shall not make such demand upon a handler with respect to reserve almonds for which he has agreed to undertake disposition pursuant to Sec. 981.67. Any handler who does not act as agent for the Board in the disposition of reserve almonds

shall be subject to the applicable inspection and certification requirements prescribed by the Board pursuant to Sec. 981.67.

Sec. 981.54 Payment to handlers for services rendered.

The Board may pay handlers for necessary services rendered by them in connection with almonds eventually disposed of directly by the Board as reserve including but not limited to storing, shelling, sorting, bleaching, grading, packaging, fumigating, and other services in accordance with such schedule of payments and under such conditions as may be established by the Secretary after recommendation of the Board.

Sec. 981.55 Interhandler transfers.

Any handler may, upon notice to and under the supervision and direction of the Board, transfer almonds or reserve credits to another handler. Any such transfers shall be accounted for in such manner that the reserve obligation and assessments on the combined transactions of the participating handlers shall be fully met and such reserve withholding obligation and assessments may be divided between such handlers in accordance with their arrangements subject to approval of the Board.

Sec. 981.56 Assistance of Board in accounting for reserve

The Board, on written request, may assist handlers in accounting for their reserve obligations and may aid any handler in acquiring almonds to meet any deficiency in his reserve.

Sec. 981.57 Application of salable and reserve percentages after end of crop year.

The salable and reserve percentages established for any

crop year shall continue in effect with respect to all almonds for which the reserve obligation has not been previously met, which are received for his own account or handled by any handler after the end of such crop year and before salable and reserve percentages are established for the succeeding crop year. After such percentages are established for the new crop year, the withholding requirements for all such almonds theretofore received for his own account or handled during that crop year shall be adjusted to the newly established percentages.

Sec. 981.59 Adjustment upon increase of salable percentage.

(a) Upon any increase in the salable percentage and corresponding decrease in the reserve percentage, the reserve obligation of each handler for the entire crop year to the effective date of such action shall be computed in accordance with such revised salable and reserve percentages. From the reserve almonds that may have been withheld by him and not yet disposed of, any handler authorized to act and acting as agent of the Board in disposing of reserve pursuant to Sec. 981.66 shall be permitted to select, under the supervision and direction of the Control Board, the particular reserve almonds to be restored to his salable percentage, and such restoration shall be deemed to fulfill the obligation of the Board with respect to such increase.

(b) In the case of handlers who have not been authorized to dispose of their own reserves, and handlers who have terminated their agencies to dispose of their own reserves, prior to an increase in the salable percentage, insofar as practicable each such handler shall be permitted to select almonds from his own reserve to be restored to his salable quantity. In the event there are not sufficient reserve almonds held by the Board at the time the salable percentage is increased, to make full restoration, as represented by the increase in the salable percentage, to all such

handlers, the restoration to the salable quantities of the respective handlers shall be pro rata on the basis of certified kernel weight poundage of reserve contributed by said handlers during the crop year to the date of increase of the salable percentage: Provided, That restoration shall be made in a manner that will result, to the extent practicable, in a comparable percentage of reserve disposition for each such handler and that no handler shall receive almonds in excess of his contribution. Such restoration to the salable quantity shall be deemed to fulfill the obligation of the Board with respect to the increase in the salable percentage.

Sec. 981.65 Prohibition on the use or disposition of reserve almonds.

Except as provided in ss 981.66 and 981.67, almonds that are withheld as reserve pursuant to the requirements of Sec. 981.50 or are creditable in satisfaction of a reserve withholding obligation thereunder, shall not be used or disposed of by any handler or any other person.

Sec. 981.66 Conditions governing disposition of reserve.

(a) General. The Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable consistent with the ultimate complete disposition of reserve, subject to all conditions of this section.

(b) Disposition of reserve for export. Sales of reserve almonds for export to destinations outside the United States, Puerto Rico, and the Canal Zone shall be made only on execution of an agreement to prevent sale within or reimportation into the United States; and in case of export to Canada or Mexico, such

almonds shall be sold only on the basis of a delivered price, duty paid.

(c) Exclusion from salable normal trade channels. No reserve almonds shall be sold in the United States, Puerto Rico, and the Canal Zone other than to governmental agencies or to charitable institutions for charitable purposes, except for diversion into almond oil, almond butter, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds, and with proper safeguards in each case to prevent such almonds thereafter entering the channels of trade in such normal markets.

(d) Time restriction on disposition. The Board shall not dispose of in export, or authorize the disposition in export, of more than 80 percent or such other percentage as the Secretary, upon recommendation of the Board or other information, may establish, of the reserve almonds of the applicable crop year. However, at any time prior to May 15 (except that such date may be extended by the Secretary to a date not later than June 30 upon recommendation of the Board or other information), the Board shall meet and review the disposition of reserve almonds. If the Board finds that the volume of reserve almonds released to export has been sold, or committed for sale, to such an extent that additional almonds could be disposed of in export, without materially affecting adversely the disposition of the oncoming crop, it may recommend an increase in the percentage to be released in export. Upon basis of the Board's finding and recommendation, or other information, the Secretary may increase the percentage. Any export percentage in effect pursuant to the foregoing shall continue to apply to the reserve almonds of the applicable crop year unless and until such percentage is increased or until all of the reserve almonds to

which it applies have been disposed of. If pursuant to Sec. 981.48, the reserve percentage is reduced during any crop year, each handler may dispose of the quantity released into export by the reserve and export percentages in effect prior to such reduction in the reserve percentage but his credit for any authorized reserve disposition shall not exceed his new reserve obligation. The Board may dispose of reserve almonds in non-competitive outlets in any crop year in which the quantity exceeds that needed for export or the export quantity is included in salable almonds.

(e) Disposition after September 1. Any reserve almonds remaining unsold as of September 1 shall be disposed of by the Board as soon as practicable through the most readily available reserve outlets. The date of September 1 herein specified may be extended to a later date by the Secretary, upon recommendation of the Board or other information.

(f) Expenses. Direct expenses incurred by the Board in the maintenance and disposition of reserve almonds shall be charged against the proceeds of sales of such almonds.

(g) Distribution of proceeds. Net proceeds from the disposition of reserve almonds by the Board shall be distributed to each handler in proportion to his relative share of such disposition in terms of creditable reserve kernel weight pursuant to Sec. 981.51 or such other basis as the Board may adopt with the approval of the Secretary. U.S. Govt. works.

Sec. 981.67 Disposition by handler.

Upon request of a handler, made prior to the delivery by him of any reserve to the Board in any crop year, the Board shall

authorize such handler to act as agent of the Board, upon such reasonable terms and conditions, including inspection and certification requirements, as the Board may specify and subject to the conditions of Sec. 981.66 in disposing of the reserve withheld from handling by such handler for that crop year. Any handler who is authorized to dispose of his reserve may, through arrangement with another handler dispose of such reserve through such other handler or, in lieu of disposition, may acquire credits for reserve disposition from another handler. In the first instance, the second handler shall also be subject to the conditions of Sec. 981.66. It shall be the obligation of any handler authorized to dispose of such reserve to effect disposition thereof in accordance with all applicable requirements and conditions. The proceeds of such disposition shall be retained by the handler making the disposition, except that, in case he disposes of the reserve of another handler, the proceeds from that disposition shall be divided between the two handlers on the basis of a mutual agreement. Such authorization shall expire as of September 1 of the next crop year, and any reserve then remaining undisposed of by the handler shall be returned to the Board. If the date of September 1 specified in Sec. 981.66(e) is extended, the date of September 1 shall be extended correspondingly. Any handler who has been authorized to act as agent of the Board in disposing of his reserve may terminate such agency as of April 1 of the particular crop year by giving written notice to the Board to that effect not later than the previous March 20, in which event such handler shall return to the Board, for disposition by it, all reserve almonds remaining in his possession. In case a handler does not terminate his agency as of April 1, he shall be required to continue to serve as such agent until September 1 of the next crop year. The Board shall not terminate such an agency prior to September 1 unless the agent violates the terms and conditions specified by the Board or other

provisions of the order. During the period of such agency the Board, as principal, shall not dispose of the reserve withheld from handling by said agent. The Board, with the approval of the Secretary may prescribe such rules and regulations as are necessary to regulate disposition of reserve almonds including methods for crediting as reserve any salable almonds sold and delivered to reserve outlets.

Sec. 981.70 Records and verification.

Each handler shall keep records which will clearly show the details of his receipts of almonds, withholdings, sales, shipments, inventories, reserve disposition, advertising and promotion activities, and other pertinent information in respect to his operations pursuant to the provisions of this part. Such records shall be retained by the handler for 2 years after the end of the crop year to which they apply. Each handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of the aforesaid records and for inspection and observation of almonds. The Board shall make such checks of almonds or audits of each handler's records as it deems appropriate or are requested by the Secretary to insure that accurate information as required in this part is being furnished by handlers.

Sec. 981.81 Assessment.

(a) Requirement for payment. Each handler shall pay to the Board on demand by the Board, from time to time, such sum less any amounts credited pursuant to Sec. 981.41, based onsuch rate per pound of almonds, kernel weight basis, received by him for his own account (exceptas to receipts from other handlers on which assessments have been paid) as the Secretary finds

isnecessary to provide funds to meet the authorized board expenses and the operating reserve requirements, and establishes for the crop year. Upon redetermination of the kernel weight of almonds received by handlers for their own account as provided in Sec. 981.61, such redetermined kernel weight for each handler, adjusted for receipts on which assessments have been paid, shall be the basis upon which he shall pay assessments. At any time during or after a crop year, the Secretary may increase the rate of assessments to apply to all such almonds during such crop year to secure sufficient funds to cover the expenses authorized by Sec. 981.80 or by any later finding by the Secretary relative to the expenses of the Board, and such additional assessments shall be paid to the Board by each handler on demand. The payment of assessments for the maintenance and functioning of the Board may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) Refunds. Any money collected as assessments for either the administrative (maintenance and functioning) or research activities of the Board and not used for the expenses of the applicable crop year, may be used in paying the Board's expenses of the first four months of the succeeding crop year. No later than the fifth month the amount not expended from assessments collected for administrative-research in the previous crop year shall be retained in the operating reserve fund. Any amounts, not credited pursuant to Sec. 981.41 for a crop year may be used by the Board for its marketing promotion expenses of the succeeding crop year, and any unexpended portion of those amounts at the end of that crop year shall be retained in the marketing promotion portion of the operating reserve fund. Any funds in each portion of the operating reserve

fund in excess of the level authorized pursuant to paragraph (c) of this section shall be refunded to handlers or used to reduce the assessment rate of the subsequent crop year, as the Board may determine. Each handler's share of a refund shall be the amount by which his payment of assessments exceeds his pro rata share of the two major classifications of Board expenses. For the purpose of computing any refund from the marketing promotion portion, each handler's payment of assessments shall include any amount credited to the handler pursuant to Sec. 981.41. In lieu of a refund, each handler may have the amount due him credited to his assessment obligation of the crop year in which the amount would be refunded.

(c) ...* * *

(d) Disposition of funds upon termination. Any money collected from assessments hereunder and remaining unexpended in possession of the Board upon the termination of this part shall be distributed in such manner as the Secretary may direct.

Sec. 981.466 Almond butter.

Almond butter as used in Sec. 981.66(c) is hereby defined as a comminuted food product prepared by grinding shelled or blanched almonds into a homogeneous plastic or semiplastic mass or liquid having very few particles larger than 1/16 inch in any dimension. To produce chunky style almond butter, almond chunks or pieces may be added up to a maximum of 25 percent by weight of the finished product. The size of the almond pieces used to make chunky style almond butter may not exceed 5/16 inch in any dimension.

Appendix N

Sec. 981.467 Disposition in reserve outlets by handlers.

(a) Agents of Board. Beginning with July 1 of any crop year, a handler may become an agent of the Board pursuant to Sec. 981.67 for the purpose of disposing of reserve almonds of such crop year, in the authorized outlets. The agency shall be established upon a handler executing a reserve agreement (ABC Form 12) ABC, applicable to export or diversion, or both, containing terms and conditions specified by the Board.

(b) Reserve credit. Credit in satisfaction of a reserve obligation shall not exceed the accrued reserve obligation derived by applying the reserve percentage to the quantity of almonds received by a handler for his own account during the crop year. Disposition by an agent of the Board in eligible reserve outlets within a crop year in excess of his reserve obligation shall be held to be a disposition of salable almonds. Whenever such disposition has been inspected and certified, if required, and has complied with the terms, conditions, and documentation applicable to disposition of reserve almonds as determined by the Board, the disposition may be credited against any reserve obligation subsequently incurred by the handler during that crop year, or the disposition may be credited pursuant to Sec. 981.455(b) against the reserve obligation of another handler.

(c) Minimum prices. Minimum prices shall apply to 1990-91 crop year reserve almonds diverted to almond butter, natural almond paste, foil packets for sales to airlines, and sales to government agencies, including federal and state school lunch programs. Prices are F.O.B. handlers plant. The prices may contain a maximum of two percent brokerage commission. No cash discounts are allowed. The prices are as follows for various grades or categories of almonds:

Appendix N

Grade or category	Price per pound
U.S. Select Sheller Run or better, unblanched	75 cents.
U.S. Standard Sheller Run, unblanched	74 cents.
U.S. No. 1 Whole and Broken, unblanched	73 cents.
U.S. No. 1 Pieces, unblanched	73 cents.
U.S. No. 1 Pieces or better, unblanched, to be used for almond butter manufactured in the 48 contiguous states and shipped to EEC countries	60 cents.
Blanched made from U.S. No. 1 Pieces or better	95cents.
Blanched made from U.S. No. 1 Pieces or better to be used for almond butter manufactured in the 48 contiguous states and shipped to EEC countries	82 cents.

(d) For the 1990-91 crop year only, the reserve disposition obligation date is extended until September 1, 1992, and the date for submitting documentation verifying reserve dispositions is extended to December 1, 1992.

(2)

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No. 96-11

In the Supreme Court of the United States

OCTOBER TERM, 1995

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that federal regulation of petitioners' marketing of almonds, pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, did not constitute a taking of petitioners' property without just compensation in violation of the Fifth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-11a) is unpublished, but the decision is noted at 73 F.3d 381 (Table). The opinion of the Court of Federal Claims (Pet. App. 13a-21a) is reported at 30 Fed. Cl. 244.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1995. A petition for rehearing was denied on April 1, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on July 1, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act (AMAA) of 1937, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue marketing orders to maintain market stability for certain agricultural commodities, including almonds. 7 U.S.C. 608c(1), (2) and (3). As relevant here, the orders may limit the quantities of a covered agricultural commodity that "handlers" or processors of the commodity may market, 7 U.S.C. 608c(6)(A), and may establish reserve pools of the commodity, 7 U.S.C. 608c(6)(E), to aid in achieving orderly market conditions. Pursuant to that authority, the Secretary has promulgated a marketing order regulating the handling of almonds grown in California. 7 C.F.R. 981.1-981.92. The California almond industry has been regulated pursuant to the AMAA since 1949. 7 U.S.C. 608c note.

The almond marketing order is administered by the Almond Board of California (the Board), a body composed of industry representatives appointed by the Secretary. 7 C.F.R. 981.30-981.40.[1] The duties of the Board include investigating and collecting data concerning growing, shipping, and marketing conditions with respect to almonds, and furnishing pertinent market information to the Secretary. 7 C.F.R. 981.39. The Board is further authorized to recommend to the Secretary, based on anticipated crop yields and prospective product demand, the

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[1] The members of the Board serve without compensation and are subject to removal by the Secretary at any time. See, *e.g.*, 7 C.F.R. 981.33, 981.37, and 981.40(d). The Board is responsible for, among other things, recommending a yearly budget for administering the marketing order, which the Secretary may accept or reject.

amount of the annual reserve, 7 C.F.R. 981.49, and the level of assessments to be charged to handlers for their pro rata share of the costs of the Board's production and marketing research activities, 7 C.F.R. 981.41. See Pet. App. 15a. The Board collects all assessments imposed on handlers by the Secretary. See *Saulsbury Orchards & Almond Processing, Inc.* v. *Yeutter*, 917 F.2d 1190, 1192-1193 (9th Cir. 1990).

When the Board recommends, and the Secretary approves, an almond reserve in any particular crop year, the marketing order directs each handler to "withhold from handling a quantity of almonds having a kernel weight equal to the reserve percentage of the kernel weight of all almonds such handler receives for his own account during the crop year." 7 C.F.R. 981.50. The order further provides that almonds held in reserve must be delivered to the Board for disposition by it, with net proceeds being remitted to the handler, 7 C.F.R. 981.51, 981.66(a) and (g), unless the handler requests authorization from the Board to act as its agent in disposing of the almonds, 7 C.F.R. 981.67. The order permits the Board to authorize handlers to act as agents "upon such reasonable terms and conditions * * * as the Board may specify." *Ibid.* Those "terms and conditions"—which, among other things, regulate how and where almonds held in reserve may be sold—are contained in "agency agreements." The agency agreements are proposed by the Board and approved by the Department of Agriculture.

2. Petitioners are producers and handlers of California almonds subject to the marketing order. They filed a complaint in the Court of Federal Claims, alleging that reserve requirements prescribed by the

almond marketing order for crop years 1982-1985, 1988, and 1990 significantly reduced the returns they received for reserved almonds in those years.[2] Petitioners contended that that diminution in value constituted a "taking" of their property without just compensation, in violation of the Fifth Amendment. Petitioners sought compensation for alleged lost profits, for assessments attributable to Board expenses, and for their costs associated with storing almond reserves. Pet. App. 7a-8a, 14a.

The Court of Federal Claims dismissed petitioners' complaint for failure to state a claim on which relief could be granted. Pet. App. 14a-21a. Observing that "[o]ne who 'embarks in a business which public interest demands . . . be regulated . . . must know regulation will ensue'" (*id.* at 19a-20a (quoting *Nebbia* v. *New York*, 291 U.S. 502, 534 (1934)), the court held that, in light of the pervasive federal regulation of the agriculture industry during the past half-century, "plaintiffs cannot reasonably assert a property interest in their almond crops free of Government control." Pet. App. 20a.

The Court of Federal Claims rejected petitioners' contention that the regulations at issue here extend beyond what petitioners reasonably could have anticipated when they entered the market. The court explained that "commercial dealings subject to regulatory control must contend with the possibility that the 'legislative scheme [may be] buttressed by subse-

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[2] Petitioners incorrectly assert that "[t]he present case arose from several administrative petitions filed by the Petitioners in this case." Pet. 8. This action arose from the filing of a complaint in the Court of Federal Claims and is independent of the administrative petitions filed by petitioners with respect to the almond marketing order. See Pet. 10-11.

quent amendments to achieve the legislative end.'" Pet. App. 20a (quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986)).[3]

3. The court of appeals affirmed. Pet. App. 7a-11a. The court first observed that, in order "[t]o be a property interest within the meaning of the Fifth Amendment, the interest at issue must be 'sufficiently bound up with the reasonable expectations of the claimant to constitute "property."'" *Id.* at 9a (quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124-125 (1978)). Because the regulatory restrictions to which petitioners object represent well-established marketing order provisions that existed before petitioners entered the industry, the court concluded that petitioners "could have had no reasonable expectation that the applicable regulatory scheme would not be enforced." Pet. App. 10a.

The court acknowledged that, even in a highly-regulated industry, a regulation "which goes too far can effectuate a taking." Pet. App. 10a. It concluded, however, that the marketing order provisions at issue here are tailored to benefit consumers as well as petitioners and other members of the almond industry, and do not rise to the level of a taking of property. *Ibid.*

Finally, the court "discern[ed] no factual or legal basis" for petitioners' contention that the reserve

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[3] The court also questioned in dictum petitioners' contention that the almonds held in reserve represent a separable component of property, distinct from the remainder of their annual crops. The court stated that "[i]t is at least arguable * * * that correctly defined, plaintiffs' 'property' consists of the *entirety* of their respective annual crops." Pet. App. 21a n.4.

requirements should be considered a "*per se* taking[]" under the principles of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pet. App. 9a n.2.

ARGUMENT

1. a. The court of appeals correctly held that the challenged marketing order did not effect a regulatory taking under this Court's Fifth Amendment jurisprudence. It is well-settled that not every economic interest or expectancy is "property" for purposes of the Fifth Amendment. *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502 (1945). To possess a Fifth Amendment property interest in an economic benefit, a party "must have more than an abstract need or desire for it * * * [or] a unilateral expectation of it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The party "must, instead, have a legitimate claim of entitlement to it." *Ibid.* Only those rights which "have the law back of them" are recognized as property within the meaning of the Just Compensation Clause. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 178 (1979); *Willow River Power Co.*, 324 U.S. at 502.

Accordingly, this Court's takings cases have "engag[ed] in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance." *Kaiser Aetna*, 444 U.S. at 175; *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Applying those principles, the court of appeals correctly held that petitioners failed to demonstrate a compensable prop-

erty interest that was taken under the regulatory scheme of the AMAA.

Each of the petitioners came into existence and entered the California almond industry after the industry had become regulated pursuant to the AMAA, and after almond reserves had begun to be imposed by the Secretary. Almond reserve requirements were imposed pursuant to the AMAA throughout the 1950s and 1960s (see Gov't C.A. Br. 216, 225, 233), and for the 1976-1977 and 1981-1982 crop years (see 47 Fed. Reg. 42,961 (1982)), while petitioners were incorporated and entered the industry between 1975 and 1986, and challenge reserve requirements imposed in the 1982-1983 crop year and thereafter.[4] Petitioners therefore plainly lacked a "reasonable investment backed expectation[]," *Kaiser Aetna*, 444 U.S. at 175, that they would be entitled to operate free of the challenged provisions of the almond marketing order.

In addition, the economic impact of the reserve requirements on petitioners' operations was minimal. As the Court of Federal Claims observed (Pet. App. 21a n.4), the great majority of petitioners' almonds were never held in reserve under the marketing order, but were instead sold by petitioners in the open

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[4] Petitioner Cal-Almond, Inc., was incorporated on April 3, 1979. C.A. App. 239. Petitioner Gold Hills Nut Company, Inc., was incorporated on October 21, 1986. *Id.* at 240. Petitioner Saulsbury Orchards and Almond Processing, Inc., was incorporated on December 1, 1977. *Id.* at 241. Petitioner Mac Enterprises, Inc., was incorporated on May 28, 1975. *Id.* at 242. Petitioner Van Kay, Inc., was incorporated on December 17, 1980. *Id.* at 243.

market.[5] Moreover, handlers subject to the reserve requirements retain the rights to (1) receive all proceeds from the sale of almonds that are temporarily held in reserve but that the handler subsequently sells in the open market to the buyer of its choice; (2) receive all proceeds from the sale of almonds held in reserve and sold in alternative outlets; (3) determine in which reserve outlets they will market their almonds, should they exercise the option of selling the reserves in an alternative market instead of relinquishing them to the Board; and (4) retain continual physical control and custody over the almonds once a reserve is announced, unless they elect to relinquish the almonds to the Board. 7 C.F.R. 981.52, 981.66(g) and 981.67.

Further, as the court of appeals recognized (Pet. App. 10a), the reserve requirements are part of a larger regulatory scheme that substantially benefits producers and handlers such as petitioners by

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[5] Petitioners err in characterizing the "property" at issue as only those portions of their almonds that were held in reserve pursuant to the marketing order. As the Court observed in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987):

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole* * * * .

Id. at 497 (quoting *Penn Central*, 438 U.S. at 130-131); see also *Concrete Pipe & Products, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-644 (1993) ("a claimant's parcel of property [cannot] first be divided into what was taken and what was left" to demonstrate a compensable taking).

sustaining orderly marketing conditions for the commodity they sell. See *United States* v. *Rock Royal Co-Operative*, 307 U.S. 533, 572 (1939); see also *Carruth* v. *United States*, 627 F.2d 1068 (Ct. Cl. 1980) (rejecting takings challenge to AMAA implementing regulations covering peanuts); cf. *Penn Central*, 438 U.S. at 134-135 ("We cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law."). The "character of the governmental action," *Kaiser Aetna*, 444 U.S. at 175, therefore strongly supports the court of appeals' holding.

b. Contrary to petitioners' contention (Pet. 13), the court of appeals did not hold "that the protection of [the] Fifth Amendment [J]ust [C]ompensation [C]lause is lost to those who enter" a heavily regulated industry. The court expressly rejected that proposition. See Pet. App. 10a ("This is not to say that in a highly regulated industry the government may regulate away all property interests."). The court correctly held (*id.* at 10a-11a) that where, as here, the regulatory restrictions to which a complainant objects were in place before the complainant obtained the subject property or entered the industry at issue, it cannot claim a reasonable expectation to be free of those very restrictions. See *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (*Penn Central*'s requirement of "interference with distinct investment-backed expectations [limits] recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime"); see also *Meriden Trust & Safe Deposit Co.* v. *FDIC*, 62 F.3d 449, 454 (2d Cir. 1995) ("the critical time for considering investment-backed expectations is the time a property is acquired, not

the time the challenged regulation is enacted"); cf. *Clajon Production Corp.* v. *Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995). By contrast, in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), cited by petitioners (Pet. 16), the challenged regulatory scheme was imposed after the complainant obtained the subject property. See *Lucas*, 505 U.S. at 1006-1007; see also *Penn Central*, 438 U.S. at 115-116.[6]

2. Petitioners next contend (Pet. 16-22) that the reserve requirement should be viewed as a per se taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court in *Loretto*, however, stressed that its holding was a "narrow" one, *id.* at 441, merely reaffirming the established rule that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve," *id.* at 426. In such cases, "the property owner entertains a historically rooted expectation of compensation." *Id.* at 441.

Here, by contrast, petitioners retained the right to physical possession of their property, as well as other meaningful rights of ownership. Contrary to petitioners' contention (Pet. 24), this Court's decisions "uniformly reject the proposition that diminution in

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[6] Petitioners' reliance (Pet. 13-14) on *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994), in opposition to the requirement of reasonable preexisting expectations is misplaced. There, the Court observed that "simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge." *Id.* at 2320. The Court did not abandon the central principle that the existence of a property interest in being free of particular governmental regulation is dependent on the backdrop of preexisting rights and investment-backed expectations.

property value, standing alone, can establish a 'taking'" that requires compensation by the government. *Penn Central*, 438 U.S. at 131; see also *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979) ("perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests").[7]

United States v. *Pewee Coal Co.*, 341 U.S. 114 (1951), and *Nixon* v. *United States*, 978 F.2d 1269 (D.C. Cir. 1992), cited by petitioners (Pet. 22, 20), are similarly inapposite. In *Pewee Coal*, the government took possession and control of privately-held coal mines in response to a nationwide strike. Concluding that the government's action amounted to "possess[ion] and operat[ion]" of a private business for public use, 341 U.S. at 117, the Court found that a taking had occurred. In *Nixon*, a federal statute divested the former President of "complete possession and control" of presidential documents created during his terms of office. 978 F.2d at 1284. The court held that divestment to be a per se taking because "Mr. Nixon had a well grounded expectation

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[7] Petitioners rely on the language of 7 C.F.R. 981.52, which requires handlers to hold reserve almonds in storage "for the account of the Board," as evidence that ownership of the reserve almonds passes to the Board, thereby effecting a "per se" taking. Pet. 17, 21. The cited regulatory language does not denote a transfer of ownership, however. It merely requires handlers to segregate almonds held in reserve, for purposes of inspection and record-keeping. See 7 C.F.R. 981.10, 981.56, 981.71; *Cal-Almond, Inc.* v. *United States Department of Agriculture*, 14 F.3d 429, 448 (9th Cir. 1993) ("Even then, they are not really held for the account of the Board in the sense of the Board's receiving the proceeds from the disposition thereof, because the handlers get those proceeds."); Pet. App. 63a.

of ownership" based on "[h]istory, custom, and usage." *Id.* at 1270, 1284. Here, by contrast, there has been no physical occupation, and petitioners have failed to demonstrate a reasonable expectation of operating their businesses free of the preexisting marketing orders.

3. Finally, petitioners contend (Pet. 23-24) that the decision below conflicts with *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994), and with *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987). In those cases, the Court considered land-use regulations that imposed as a condition on the approval of property development the requirement that the owners provide public access across their property. This case is quite different from *Dolan* and *Nollan* because it involves commercial regulation of personal property, see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. at 1027-1028, and because petitioners lacked reasonable investment-backed expectations that they would have a right to operate in the almond market free of the aspect of commercial regulation to which they now object. *Id.* at 1030. In any event, for the reasons discussed above, the reserve requirement "'substantially advance[s] legitimate [governmental] interests' and does not 'den[y] an owner economically viable use of his [property].'" *Dolan*, 114 S. Ct. at 2316. The court of appeals therefore correctly rejected petitioners' takings claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1995

CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., BROWNS LAKE RANCH, MAC ENTERPRISES, INC., VAN KAY, INC., and DERK VAN KONYNENBURG,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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FURTHER REASONS FOR GRANTING THE WRIT

Petitioners are growers and handlers of almonds grown in California. Not in every year, but in several years, a portion of almond crops between 1980 and 1991 was declared a "reserve." The Secretary took Petitioners' almonds (worth over $4 million) by edict. He described his action as giving himself and the Almond Board (his statutory agent) "plenary" authority, "complete" power, and "full power and authority" over Petitioners' almonds, leaving them "no voice" in the terms and conditions of the "reserve" or its disposition.

Petitioners demonstrated in the Petition that the Secretary's actions were a *per se* TAKING under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); and *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) because the character of the Secretary's action was to take ownership of the almonds leaving handlers with agency rights far less extensive and valuable than in the above cited precedents. Petitioners also showed in the alternative that the Secretary's actions were a "regulatory" TAKING under *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); and *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) because the "reserve" regulation destroyed the value of the almonds and because the Secretary had not demonstrated that the reserves substantially advanced a legitimate governmental interest. The Government's opposition demonstrates (rather than dispels) the need to grant this Petition.

Respondent argues that the Fifth Amendment only applies to surprise TAKINGS, not to ones where the Government has given advance warning. It also contends personal property does not deserve just compensation when taken and that it has no

burden (beyond mere assertion that the reserves substantially advanced its interests. Finally, the Government argues that a TAKINGS claim can be defeated if any value remains in the property interests granted by the Secretary to his handler agents to dispose of almonds which were formerly and entirely their own. All of the Respondent's arguments must be rejected as they are not the law in this Court.

1. Respondent errs in claiming that Petitioners *contend* that the diminution in value of their almonds ordered disposed of as a reserve constituted a "TAKING". (Br. in Opp. 4). The facts demonstrate much more than a mere "diminution in value". Petitioners contend the Secretary's action constituted not only a TAKING *per se*, but a regulatory TAKING as well because the reserve did not substantially advance the governmental interest asserted.

The Secretary ordered the reserve transferred to the Almond Board of California unless the Petitioners signed up as the Secretary's agents and dumped the reserve into cattle feed or the Secretary's school lunch programs. Far more than just a "diminution" in value occurred when the reserve was imposed; the total economic value of the reserve almonds was destroyed.

2. The Respondent erroneously claims (Br. in Opp. 4 n. 2) that this action arose from the filing of a complaint in the Court of Federal Claims and is independent of any administrative petition filed by the Petitioners. The Agricultural Marketing Agreement Act (AMAA; 7 U.S.C. § 601 *et seq.*) mandates that the Petitioners exhaust administrative remedies before filing any action in federal court contesting the legitimacy of any marketing order provision. (7 U.S.C. § 608c(15)(A); *United States v. Ruzicka*, 329 U.S. 287 (1946)). Petitioners laboriously exhausted that process which resulted in the Secretary's decision that Petitioners have no rights consistent with

"ownership" remaining when a reserve is imposed. (App. 102a, 106a).

Respondent makes this argument in an attempt to divert this Court's attention from the Secretary's decision interpreting the reserve requirements of the Almond Marketing Order. He observed that once a reserve is announced the Secretary and the Almond Board have "plenary" and "complete" power over the reserve (App. 106a) and that the handlers "have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds". (App. 106a). This USDA interpretation absolutely contradicts the Respondent's assertion that there was only a "diminution in value" with respect to the reserve. Since this Court gives great deference to the Agency's interpretation of the statute it is in charge of administering, *see, e.g., Chevron USA, Inc. v. National Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-45 (1984), the Respondent is now without power to reinterpret the regulatory obligations imposed upon a handler when a reserve is instituted by USDA.

The Government cannot issue a regulation, the meaning and effect of which absolutely requires the handler to give physical possession to the Government (or to dispose of the handler's property only pursuant to the authority granted through signing an agency agreement with USDA) and not have that action be called a TAKING *per se* under this Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

3. Respondent's claim (Br. in Opp. 7) that Petitioners lost the protection of the TAKINGS Clause by entering the almond industry after passage of the Order in 1950 conflicts with this Court's "unconstitutional condition" and related precedents most recently affirmed in *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2440 (1996) (thrifts do not forego normal contract

remedies even though their industry "is one of the longest and most closely supervised of public callings."). Neither Congress nor an agency can eviscerate the TAKINGS clause by merely deciding it will assume authority to TAKE in the future.

First, as pointed out in *Webbs Fabulous Pharmacy, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) the Government "by *ipse dixit*, may not transform personal property into public property without compensation. . . . This is the very kind of thing that the TAKINGS Clause of the Fifth Amendment was meant to prevent." Moreover, even though the Government had taken interest on interpleaded court accounts for years, this historical fact was so unimportant that it was not even mentioned in this Court's TAKINGS analysis.

Secondly, this Court very recently, in *Dolan v. City Tigard*, __ U.S. __, 114 S. Ct. 2309 (1994) rejected, by implication, the City's argument that Mrs. Dolan's application for a building permit to expand her hardware store was subject to the City's unfettered conditions because the City had its master land use plan authorizing those conditions in place for years prior to her application.

In addition, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) this Court rejected, by implication, the Coastal Commission's argument that since its plan had been in place for years prior to the Nollan's applying for their permit that they could attach whatever conditions they wanted in exchange for granting that building permit.

In addition, there is no mandatory reserve each year. Indeed, it is only *after* all of the cultural costs have been expended by the Petitioners in producing and processing the crop in question that the Secretary decides whether he will issue a reserve for that year. Respondent has not claimed or shown

that that the value of the land and/or almonds when acquired by Petitioners was discounted by the market to reflect any reduction in value to potential speculative future reserves.

Simply stated, the Government cannot destroy property rights and avoid payment of compensation by merely enacting some statute that gives it the authority to take a person's property in the future.

4. The Respondent erroneously claims (Br. in Opp. 7) that the economic impact of the reserve requirements on the Petitioners' operations was "minimal". The reserve taken by the Secretary in the years in question amounted to millions of pounds of almonds worth more than $4 million. The Secretary can no more take 100 pounds of almonds than it can take 50 million pounds of almonds. For example, in *Webbs Fabulous Pharmacy*, the government only took the "interest", it did not take the principal. In *Dolan*, the City only wanted to take enough land for a "bike path", a small portion of *Dolan's* property. In *Nollan*, the Coastal Commission was "only taking an easement", and in *Loretto*, the Government's occupation of Loretto's property consisted of a device no bigger than a "bread box".

There would be no question that if the Government drove in to the Petitioners' place of business, and, with the assistance of forklift, removed a bin of almonds and took it to Desert Storm, that a TAKING would have occurred. The Government can no more take the Petitioners' almonds with an ink pen than they can with a forklift, and a TAKING occurs whether the property TAKEN was held in a bin or in an entire warehouse.

5. Respondent improperly puts controlling weight on a number of property rights allegedly retained by the handlers when the Secretary announces a reserve (Br. in Opp. 8) under

which the handler can receive the proceeds from the sale of the almonds, can determine in which reserve outlets they will market their almonds, and they can ("unless they *elect to* relinquish the almonds to the Board") retain continual physical control and custody over the almonds.

The Respondent's argument fails dramatically as a result of its failure to come to grips with, let alone even mention, the Secretary's decision which held that when a reserve is announced, the Almond Board has "complete" and "plenary" control over the reserve. The Government cannot avoid paying compensation for TAKING almonds, just because it gives the property owner the "choice" of involuntarily transferring possession directly to the Government or involuntarily transferring possession to a charity of which the Government approves. In *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (misconstrued by the Respondent, Br. in Opp. 11) this Court held that the Government's announcement that it was taking over coal mines in response to a nationwide strike, amounted to a TAKING even though the operator of the mine could continue to operate it "on behalf of the Government", and was entitled to keep whatever profits were made. It was of no decisional significance to this Court, in deciding that a TAKING had occurred, that the "owner" of the mine was allowed to continue to operate it or keep the profits from the sale of the coal. In this case, the returns for the sales of the reserve almonds to the outlets blessed by the Secretary do not even recoup the costs of producing and handling those almonds. Those costs are not recouped whether the handler relinquishes physical custody to the Secretary or signs up as the Secretary's agent and sells them at the same loss to the worthless outlets allowed by the Secretary.

To claim that the Petitioners' property rights were not affected because the Petitioners could opt to become the

Secretary's agent and thus keep "physical" control over the almonds defies what is historically meant by property rights. In addition, the Petitioners, if they "elected" to be drafted into the Secretary's "army", were required to dispose of those almonds by September 1 of the following crop year (7 C.F.R. § 981.67) and if not, physical possession was required to be transferred to the Almond Board. Thus to claim the Petitioners' rights were minimally infringed is specious.

6. The Respondent errs (Br. in Opp. 8 n.5) by claiming that Petitioners' property rights are defined by the total amount of available almonds, and not just the amount of reserve almonds. This Court held in *Lucas v. South Carolina Coastal Counsel*, __ U.S. __, 112 S. Ct. 2886, 2889, n. 7 (1992) that one must look at the property in question to determine whether or not the property is divisible or what would be the unit in question. With respect to almonds, handlers pay growers a certain amount of money *per pound*, almonds are sold by handlers *by the pound*, and the Secretary imposes assessments on the handlers *by the pound*. (7 C.F.R. § 981.81; App. 184a). As stated previously, the Secretary can no more drive away with one bin of the Petitioners' almonds than he can drive away with all of the almonds, without paying just compensation.

7. The Government's argument that the Secretary's regulatory scheme benefits Petitioners is erroneous and without foundation. (Br. in Opp. 8-9). This alleged fact was totally unproven. While the Secretary could withstand a challenge under the Administrative Procedures Act in issuing a reserve (because a challenge such as that would require a Petitioner to show that the Secretary's decision was arbitrary and capricious) that is *not* the test employed in determining whether a regulatory TAKING has occurred. As this Court pointed out in *Dolan and Nollan*, the Government must show that the regulation "substantially advances a legitimate governmental

interest." That is far more than just showing that it is not arbitrary and capricious. This case was decided by the court on the Government's motion to dismiss for failure to state a claim. There was no undisputed evidence presented by the Government that the reserve announced by the Secretary in the years in question "substantially" advanced the governmental interest in orderly marketing. Indeed, in Petitioners' complaint and in its undisputed facts for their motion for summary judgment, the exact opposite was shown. (App. 123a-126a; 144a-146a).

Secondly, the Federal Circuit's and the Claims Court's statement that Petitioners' "business as a whole" was profitable, despite the reserve, is *not* the test in a TAKINGS case. Obviously, the *Dolan's and the Nollan's* property were still worth considerable amount of money despite the attempt of Government regulation for a bike path and easement, respectively, and so was *Mrs. Loretto's* apartment building in New York despite its bread box-sized cable box. No doubt General Motors would still be profitable if the Government took 100 cars per year off its assembly line for the Government's use, but the Government would still have to pay General Motors just compensation.

For the same reasons, the Respondent's conclusory statement (Br. in Opp. 12) that the reserve requirements substantially advance a governmental interest is without support in the record, and if this Court were to hold that there was not a *per se* "TAKING" under the reasoning of *Loretto*, Petitioners are entitled to a trial on the merits to determine whether the Secretary's reserve substantially advanced its interest in orderly marketing and increasing returns. Under this Court's holding in *Dolan and Nollan*, the fact that the Government thinks it substantially advances its interest is simply not enough.

8. Respondent erroneously claims (Br. in Opp. 12) that the Petitioners cannot rely on *Dolan and Nollan* because those cases dealt with real property, and in this case there is a "commercial regulation of personal property". Nowhere in TAKINGS jurisprudence, and no where in the Fifth Amendment is the Government given more rights to take personal property than real property. It was of no significance in *Webbs Fabulous Pharmacy* that the property taken there was "interest" earned on money. Similarly, this Court's analysis in *Andrus v. Allard*, 444 U.S. 51 (1979), discussing whether or not the regulation of eagle feathers amounted to a TAKING, did not turn upon the fact that the eagle feathers were personal property, as opposed to real property. The Government simply can no more take almonds for its school lunch program than it can take real property to build the school in which to serve them.

The Federal Circuit has become hogtied by its own legal principle, created out of whole cloth, that if the Government decides to regulate, no one who enters that regulated industry in the future can be heard to complain about the regulations. This is simply not the law. Unfortunately, virtually all U.S. Government TAKINGS cases must be brought before the United States Court of Federal Claims, and then to the Federal Circuit, and only this Court can correct this major constitutional error being committed by the Federal Circuit. This Court in *Dolan* stated that the Fifth Amendment Just Compensation Clause is just as important as any other amendments to the United States Constitution. There can be no First Amendment jurisprudence allowing restrictions of speech or the press just because the Government has announced at an earlier date that they will restrict speech and the press in the future. There can be no such exception with respect to the Fifth Amendment.

CONCLUSION

Since the Federal Circuit has a virtual monopoly on Federal Government TAKINGS cases, it is important for this Court to correct the monumental legal error and crabbed reasoning being made by the Federal Circuit in its "regulated industry" analyses and its total misconception of TAKINGS *per se* holdings of this Court. Respectfully, the Petition for Writ of Certiorari should be granted.

Dated: October 3, 1996

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